SOME OBJECTIONS

TO A

JOINT RESOLUTION,

PASSED AT THE LAST SESSION OF THE LEGISLATURE, AND ABOUT TO BE SUBMITTED AT THE APPROACHING SESSION,

RECOMMENDING TO THE PEOPLE OF PENNSYLVANIA

AN ELECTIVE JUDICIARY.

Phila,

DECEMBER, 1849.

OBJECTIONS, &c.

A Resolution was passed by the Senate of Pennsylvania, the 1st of March, and by the House of Representatives the 2d of April, 1849, in the following terms:—

"*Resolved, by the Senate and House of Representatives of the Commonwealth of "Pennsylvania, in General Assembly met,*

"That the Constitution of this Commonwealth be amended in the second section of the fifth article, so that it shall read as follows: The Judges of the Supreme Court, of the several Courts of Common Pleas, and of such other Courts of Record as are, or shall be established by law, shall be elected by the qualified electors of the Commonwealth, in the manner following, to wit: The Judges of the Supreme Court, by the qualified electors of the Commonwealth at large. The President Judges of the several Courts of Common Pleas, and of such other Courts of Record as are or shall be established by law, and all other Judges required to be learned in the law, by the qualified electors of the respective districts over which they are to preside or act as Judges. And the Associate Judges of the Courts of Common Pleas, by the qualified electors of the counties respectively. The Judges of the Supreme Court shall hold their offices for the term of fifteen years, if they shall so long behave themselves well: (subject to the allotment hereinafter provided for, subsequent to the first election.) The President Judges of the several Courts of Common Pleas, and of such other Courts of Record as are or shall be established by law, and all other Judges required to be learned in the law, shall hold their offices for the term of ten years, if they shall so long behave themselves well: The Associate Judges of the Courts of Common Pleas shall hold their offices for the term of five years, if they shall so long behave themselves well: all of whom shall be commissioned by the Governor; but for any reasonable cause which shall not be sufficient grounds of impeachment, the Governor shall remove any of them on the address of two-thirds of each branch of the Legislature. The first election shall take place at the general election of this Commonwealth, next after the adoption of this amendment, and the commissions of all the judges who may be then in office shall expire on the first Monday in December following, when the terms of the new judges shall commence. The persons who shall then be elected Judges of the Supreme Court shall hold their offices as follows: one of them for three years, one for six years, one for nine years, one for twelve years, and one for fifteen years; the term of each to be decided by lot by the said judges, as soon after the election as convenient, and the result certified by them to the Governor, that the commissions may be issued in accordance thereto. The Judge whose commission will first expire shall be Chief

Justice during his term, and thereafter each judge whose commission shall first expire shall in turn be the Chief Justice, and if two or more commissions shall expire on the same day, the judges holding them shall decide by lot which shall be the Chief Justice. Any vacancies happening by death, resignation or otherwise, in any of the said courts, shall be filled by appointment by the Governor, to continue till the first Monday of December succeeding the next general election. The Judges of the Supreme Court, and the Presidents of the several Courts of Common Pleas shall, at stated times, receive for their services an adequate compensation, to be fixed by law, which shall not be diminished during their continuance in office; but they shall receive no fees or perquisites of office, nor hold any other office of profit under this Commonwealth, or under the Government of the United States, or any other State of this Union. The Judges of the Supreme Court during their continuance in office shall reside within this Commonwealth, and the other Judges during their continuance in office shall reside within the district or county for which they were respectively elected."

This resolution, if it pass also the Legislature which convenes in January, 1850, will be submitted to the people under the tenth Article of the Constitution, to be ratified or rejected by them as an amendment of that instrument; and, should it be ratified, the judiciary will thereafter be elected at the polls instead of being appointed by the Governor and Senate. An effort has been made by the friends of the proposed amendment, to press it as a remedy for existing complaints against the Courts, as a great improvement upon the Constitution of 1839, and an enlarged and liberal movement. We deem it to be no cure for present ills, we believe it will make worse the judicial provisions of the Constitution of 1839, which we confess (we say confess, for we supported and voted for them) have proved to be a lamentable failure, and we think that, instead of being a measure of independent policy, it is on the contrary a narrow, hasty, ill-reflected proposal, offered like too many others for our adoption in a spirit of dependence upon foreign thinking, and without breadth or merit of any sort. We altered our judiciary ten years ago, and we deteriorated it. One proof of its backward progress is the fact that with the good behavior tenure we were contented from 1790 to 1839, forty-nine years, while that of the term of years, after lasting about nine, and producing not one single valuable result, has already brought us to a call for relief and to steps to obtain it. No act of high and fundamental legislation was ever more lightly entered upon than this present resolution of the Legislature, which went through its different stages without a committee being raised or inquiry made, after no pondering by our political advisers of the important problem that was before them, after no thinking, contriving, or casting about, nay in

the House not so much as a debate; but the Senators and Representatives, satisfied that the judiciary as it stands does not please their constituents, just slash it to pieces. Being about to amend the judicial system, two ways were open to them. One, that of deliberate inquiry and patient examination, the other that of unreasonable and precipitate decision. They might proceed as became republican legislators, or, like some careless master giving the case no thought and themselves no trouble, stop the mouth of discontent and astonish all who express it by an act of summary violence. They might raise a committee, send for persons and papers, look into the proceedings of the various courts, examine those who are conversant with them, hear both sides, search out the evil and then apply the remedy; or they might dismiss the judges and have an entire new set. The question whether our judiciary is a failure is for the most part a question of technical detail, upon which, without having before us the various facts, figures, and statistics as well as the principles involved, it is impossible to vote understandingly. The adoption of an elective bench depends upon, among other things, our having failed to obtain a good one by appointment, and our being able to trace its faults to our mode of filling it, facts which a committee alone could supply for us, and which we can be furnished with from no other source. There are points of fundamental doctrine on which we make up our minds for ourselves. We need no collation of cases to establish the principle that the judiciary ought to be a branch of the government distinct from the executive or the legislature. But when we are called upon to change our mode of obtaining a judiciary from appointment to election, every man at once asks himself whether the executive and senate, at whose hands we have been in the habit of receiving judges, have given us bad or good ones, and if bad ones, then what their vices are, and whether they are traceable to such causes as to authorize us to expect reformation from a change of the appointing power. The answer to these questions depends on facts with which the people are not acquainted, on which the Legislature, not having taken the pains to acquaint themselves, are just as much at home as the people, and in regard to which not a man in the state, without being endowed with the powers of a committee of the Senate or House of Representatives, has the means satisfactorily to inform himself. Individuals the best informed upon the merits and demerits of the present administration of the law find their knowledge of it necessarily limited to their own districts. They may be thoroughly acquainted with the

Courts of the County in which they reside, and in whose habits of business it has been their lot to become versed, and yet be as ignorant of what pertains to the judicial tribunals of the state at large as if they were seated in some distant and foreign territory. If the Legislature do not deign to lead us, we must jump in the dark, and vote uninstructed as well of the truth and justice of the case as of their motives in setting us the example of insisting upon fundamental change.

As lately as the session of 1848, a Senate resolution for electing the judges, found in the House, among the immediate representatives of the people, but twenty-four members to vote for it; and, as no debate on this subject had been heard there between the concurrence with the Senate resolution in 1849, and the refusal to concur, in 1848, it is not easy to understand upon what new motive or warrant this most important step was ventured. We verily believe that, so far from our fellow-citizens generally having called for and expected it at the hands of the Legislature, there were few men within the four corners of the state who knew that such a measure was in serious progress. The newspapers gave little or no information about it. The papers of the 1st of March 1849 announced that, on the 28th of February, the day before, in "the Senate, the resolution relative to an amendment of the Constitution so as to make the judges elective, was taken up, and opposed by Messrs. Overfield, King, and Drum, and supported by Mr. Small; passed second reading, and was ordered to be transcribed for a third reading," and those of the 2d of March, that, on the 1st of March, "The bill for the election of the judges by the people was read a third time, and passed; yeas 21, nays 8." But no debates, or reports of debates, no public agitation or discussion, either in, or out of doors, of this most grave topic arrested the attention of the country, or gave warning of what was at hand. When the question came before the House, on the 2d of April, after being reported against by the Judiciary Committee, members, incredible as it may appear, would listen to no discussion; the previous question was called, debate cut off, and Mr. Cornyn, of Huntingdon county, who was addressing them in strong and convincing terms, was stopped in the midst of his speech. It is actually a fact, established by eye-witnesses, and vouched by the journal, that the Constitution of the State was not, by the representatives of the people, thought to be worth an argument. While, as the same journal exuberantly proves, divorce bills, bank bills, charters for hose com-

panies, gas works, and graveyards, bills to change men's names, to gratify their whims and fancies, or facilitate the conveyance of their estates, bills, in a word, for the relief, ease, or comfort of this or that individual, could be debated *ad libitum*, this high constitutional question, which, for good or evil, touched the condition of every man, woman, and child in Pennsylvania, was denied the decency of a hearing! Why was it, we venture the interrogatory, but not the answer to it, that private interests should have had at the capitol their advocates and their attentive listeners, when the most momentous public concerns were turned out of doors? Some of the minority entered it on the journal as among the reasons for their votes, "that the previous question has been twice called on a resolution of great moment, which has not been discussed in the House!" In the Senate, all we know, or ever could discover of public knowledge of the bill, was what we have already quoted from the newspapers, that Messrs. Drum, King, and Overfield opposed, and Mr. Small advocated it, and then that it passed, twenty-one to eight. But we will not pursue this flagrant part of the case, upon which, indeed, it would be impossible to comment without passing the limits of that forbearance of thought and expression which is due to what ought to be the collected dignity and discretion, as well as the collected wisdom, of the state. We will not press the question of the mode and manner in which this subject ought to have been treated; whether the judiciary being to die, is to be carved as a dish for the gods, or hewed as a carcass for the hounds, but limit ourselves to the inquiry, whether its case has been understood, and whether any sacrifice of it at all is called for by the public voice, or is necessary to the public good. Its enemies say, and they are not a few, in the year 1790 we made the judiciary independent, we gave it the life tenure, we entrusted the power of appointment to the executive, and we then made a forty-nine years' experiment of it, and it failed. In 1839, we modified it, making the tenure of office for a term of years only, instead of for life, but still leaving the appointing power with the governor, to be aided by the Senate; we then had a nine years' experiment of it, and it failed again. And now we are going to make root and branch work; it shall go to the polls with the governor and Legislature. It may go to the custody of the sergeant-at-arms if they choose to send it there; but the question remains, will their new measure, now before the people, and which, as we humbly think, smacks rather of castigation than of constitutional forecast and wis-

dom, give to the citizen a more satisfactory administration of the laws? It is idle to say, we will alter our Constitution, we will drive out the old judges and elect new ones by the people, or appoint them by the governor, or choose them by lot, if with all our novelties we do not correct a single one of the vices of the old establishment. Altering the Constitution, and shortening the lives of the judges did us no good in 1839, nor will altering the Constitution and putting the judges to sudden death, help us in 1850. Our difficulty lies not so much in the Constitution, as in the laws. A good constitution is a good thing; but it will go no farther to make a nation great and happy whose laws are bad, than will the gifts of nature towards the respectability of individuals who refuse to improve their advantages by virtue and good habits. Much remains to be done for good government, after we have established a republican form; nor will it avail to afford us a perfect, or even a fair judiciary, to confer the power of appointing to places on the bench in the wisest quarter, whether that be the people or the executive, if we omit to provide, withal, for the details of its administration. It is not true that "that which is best administered is best;" but it also is a heresy to insist that we may confide in our form of government, and, with impunity, forget to check by salutary restraint, the perpetual tendency of the very best institutions to corruption, and that of all those who administer them to idleness and mischief.

It will be our object, in these pages, to endeavor to show, even in the discouraging face of the late vote of 21 to 8 in the one house, and 58 to 26 in the other, that an elective judiciary is not necessary, and would be pernicious. The question is one which so interests all, that none of us, however humble his pretension to an ability to enlighten his fellow-citizens, and, however signal may be his failure in the endeavor, can be blamed, or even smiled at, for attempting it. It is not a question of party. Were it such, we should feel that we were especially incompetent to deal with it, though it has struck us, and we cannot avoid hazarding the observation to those who, like ourselves, have never mixed in the controversies of politics, that while here is a measure which the democrats ought to condemn, because, in stripping the executive of the authority to name the judges, they virtually surrender for partition with their adversaries, no small portion of that power and patronage which to themselves, as the large majority of the state, is at present almost exclusively appropriated, and which the whigs, the professed representatives of the mode-

ratism of the commonwealth, seem bound to discountenance as an assault upon that branch of the government which is essentially conservative, yet so it is that both these grand divisions of the state seem actually now to be vieing with each other for the honor, a sorry one at best, of leading an attack upon the intrenchments of the Constitution. We desire in the first place to notice two errors of our present judicial establishment, the amendment of which—and they may be amended by a very little and simple legislation—would, as we believe, spare the community the trouble of debating this sudden and dangerous innovation upon constitutional provisions and long-received opinions. There are two particulars of the judicial arrangements in Pennsylvania, both of them of the last importance, in which we have made such mistakes of legislation as would damage, if not destroy, the strongest and wisest constitutional basis upon which laws could be rested. They are sufficient to make a really good judiciary impossible, so long as they shall be persisted in, and to account for the faults which we impute to ourselves, without a resort to remoter causes to explain our discontents. Those errors are: *First*, the irresponsibility of the judiciary; and *Second*, its excessive numbers. We have by far too many judges for the labor they perform. We have supplied ourselves with no measure, short of the extreme one of disgraceful removal, by which to secure judicial good behavior. Both of these topics, especially the latter, demand that sort of illustration which a legislative committee, having at its command the public records and full access to testimony, alone can properly furnish. But, being of a more general nature than many of the subjects of detail connected with the question which is before the state, we purpose to attempt, by a brief suggestion of some of the views which have presented themselves to us on these two points of judicial responsibility and judicial numbers, to enable ourselves to exhibit what might be the utility of a thorough legislative examination of the whole ground. We have a bench which is worth preserving; for, while it comprises every variety of the judicial individual, from men of learning, talent, and ambition, down to specimens of a very opposite nature, yet, as a body, it has earned and constantly maintained, since its first establishment, a character both for instruction and ability; and above all, for integrity, that virtue beyond all price, that steady and enduring light, before which genius itself, and every other fire, grows pale. While we have had to listen to repeated charges against the purity of the other two branches of the government,

we believe it may be safely said that the first whisper is yet to be heard against the uprightness of the bench. A system, which has given us nothing but honest men, or, what is more to the purpose, nothing but honest functionaries, whatever may have been the men, cannot be radically vicious.

And *first*, then, we assert that our judges are too numerous: our laws are bad in this, that we have so cut up the state into districts as to bestow upon ourselves a great deal too many judges; so much too many, regard being had to the number of suitors, that we are like the smaller powers of Europe, where the standing army is in such immense disproportion to the people, that the people and the army reciprocally accuse and reproach one another. Crowding our bench with judges, damages the judiciary precisely as we should spoil our farms or ships by overstocking them with hands. Little work is done, that little not well, and we have bad blood beside. The more closely the judge is engaged, the more pressed he is, the more causes he tries, the more arguments he hears in the course of a session or term, and the more sessions and terms there are in the year, the more sound, practical, and business-like are his judgments and conclusions, the healthier the condition of the law, and the better satisfied the community to which it is dispensed.

There have been established by law, and are now existing in Pennsylvania, a Supreme Court, with appellate jurisdiction over the commonwealth generally, twenty-four courts of Common Pleas, and two District Courts with local jurisdiction, and justices of the peace or aldermen in every ward, borough, and township of the state. Their numbers are as follows: five judges of the Supreme Court, twenty-seven law judges of the courts of Common Pleas, two lay judges of the Common Pleas for each county, making, as we believe, one hundred and two judges, five judges of District Courts, two for the county of Alleghany, and three for the county of Philadelphia, and last, not least, either in numbers or in importance, two thousand seven hundred and forty-eight aldermen and justices of the peace with civil jurisdiction up to one hundred dollars, and primary criminal jurisdiction beside. Here are two thousand eight hundred and eighty-seven persons, not to count the federal judges, employed in administering justice to a community containing less than two and a quarter millions of inhabitants, supposing our population to have increased in the same proportion since the last census, as it did between that and the census of 1830. Striking off half of the two and a quarter millions, which is greatly too small a proportion,

for children under age, and half of what remains for women, it would seem that of the persons of full age, and of the law-giving sex, about every hundred and ninety-fourth creature we meet with in our walks in Pennsylvania, is a judicial character; and, giving each of these planets of the law four satellites only, in the shape of clerks, bailiffs, and lawyers, we have about one in every forty-nine of us, occupied in settling the disputes of the other forty-eight. It is true, that most of these two thousand eight hundred and eighty-seven individuals are lay justices, and not what we popularly call judges; but it is none the less true that they transact, laymen or not, the greater portion of the business done in the state, which, begun and ended before them, is never heard of by the other judges. We know of no Pennsylvania statistics to which we might refer to ascertain exactly what proportion of the judicial labor of the commonwealth is upon the shoulders of the aldermen and justices, but we have before us what will shed a side light on the subject, in a speech of Mr. Brougham, delivered in the British House of Commons, the 29th of April, 1830, by which we learn that, in the year 1827, returns were made for some purposes connected with the abuses of the English courts, which showed that of ninety-three thousand suits brought in a given time, in the King's Bench and Common Pleas for debts above ten pounds, not less than twenty-nine thousand eight hundred were for sums not exceeding twenty pounds. Of suits for debts, counting those only which were for sums exceeding ten pounds, nearly one-third was for sums between ten and twenty pounds. If, therefore, taking all the suits for debts brought in Pennsylvania in a year, somewhat less than one-third of them is put down as being for sums between $44 40 (ten pounds), and $88 80 (twenty pounds), and we add to that all the rest from $44 40 down to nothing, and from $88 80 up to the limit of the jurisdiction of our justices, $100, and then again add to this something for the probable greater proportion of small suits in Pennsylvania than in England, it will be perceived, how vast an amount of business comes within the province of the inferior magistrates. Hale, a venerable authority, in his "considerations touching the amendment of the laws," written a hundred and fifty years ago, shows that the preponderance of small over large causes is no modern novelty; "it is very apparent," he says, "to any man that converseth with business, that divide the suits that come down to the assizes, to be tried at the great courts, near one-half thereof are under forty shillings,

at least in some counties." In fact it is with the law as it is with everything else in the world, the little is very abundant, the great very rare, the sands are not so easily counted as the rocks, and the individuals earning their dollar or more a day, are in an immense majority over the more fortunate persons who come into court to make good their title to a ship or a farm. Nor are parties to small causes tempted as often as we would suppose they were, by appealing, to put themselves to the expense, and the upper judges to the trouble, of fresh or further proceedings; especially where, as in Pennsylvania, the trial before the appellate tribunal, the Court of Common Pleas, is not accommodated to the dimensions of the case brought up from the petty jurisdiction, but is just as expensive so far as regards legal costs, as if it concerned the largest amount. We have had an examination carefully made of the docket of one of the aldermen of the city of Philadelphia, for 1842, the year, which was the last of his service, being taken entirely at random, by which it seems there were brought before that magistrate, between the 31st Dec. 1841, and the 1st January 1843, sixteen hundred and ninety-two civil actions; and although one hundred and fifty-four appeals were initiated in these cases, yet in only ninety-four of them were the appeals perfected by the filing of transcripts in the Common Pleas. So it seems that sixteen hundred and ninety-two suits produced but ninety-four appeals, being exactly one to every eighteen cases, a proportion so small as, with the figures already given, to be sufficient proof to satisfy us, that the unlearned judges are by no means to be omitted from the reckoning of our judicial numbers, and indeed, to leave it for the fair conclusion, that more than half of the administration of justice in Pennsylvania is in the hands of the lay magistracy.

A glance must satisfy any thinking person, that this force of two thousand eight hundred and eighty-seven judges, which is numerically a small army, for it comprises men enough to fill four regiments, is out of all proportion to any work which two and a quarter millions of souls, of all ages, could by any dint of litigation supply for them. For the sake of a standard by which to fix the relative force applied to our machinery of justice, we will take the English judiciary and compare ourselves with that; for it will hardly be doubted, that whatever an English judge can accomplish, that the American is also capable of performing. Until lately, they had in England only twelve Common Law and two Equity judges, who did the whole civil business of the kingdom, excepting what passed through the Admiralty and Ecclesiastical Courts, and

excepting part of that of Wales and of the counties palatine; and who did also all the criminal business, but the trial of minor offences. There was no pecuniary limit to the jurisdiction of these courts. *Moses* v. *Macferlan* itself, which set the law in a blaze, and so shocked the special pleaders of England, turned upon four thirty-shilling notes, and might have turned upon sixpence. The Courts Baron, and other local tribunals, had fallen into desuetude, and but that the sheriffs and certain inferior magistrates had a concurrent jurisdiction with the courts in cases under forty shillings, the whole burden lay on the twelve judges, the Chancellor, and the Master of the Rolls. And what may be considered strange is, that the modern reform which withdrew small cases from their cognizance, and relieved them of so much of their labor, was strenuously opposed by the judges themselves, and that, too, at a time when their salaries were at less than half their present amount. Thus, three common law courts, of four persons each, a Chancellor and a Master of the Rolls, aided by some inferior criminal tribunals, administered justice for well nigh the whole kingdom of England.

But it will be said, this force was found inadequate to its objects, and that one of the modern reforms has been much to increase it. It is to Bentham that the English owe whatever improvement has been effected in their law. He looked at systems and sciences, not like men of the Blackstone class, to applaud them because they were venerable, but to judge them by their principles, and to question and inquire into their usefulness to mankind. He was followed in his philosophical footsteps by other men who were, some of them, philosophers too, but chiefly politicians and lawyers—by the Romillys, Mackintoshes, Taylors, Broughams, and Williamses. Reform of the law became a political question; and the result has been a succession of alterations of more or less import, both of the law itself and of its administration, and among the rest, which is all that concerns us now, a considerable addition to the number of the judges to meet the increase of population, and a revival of the ancient County Courts, for the dispatch of the smaller business. Instead of two equity judges, they have now five; and instead of twelve judges for the three courts of Common Law, they have fifteen; each court consisting of five persons instead of four. And these three courts, instead of having a jurisdiction down to any amount, however small, are relieved, with certain exceptions, of all cases where the sum in controversy is less than twenty pounds, those being now committed to the new County Courts, where justice is more summarily and less expen-

sively administered than in the superior tribunals. There are sixty of these County Courts. Each of them is presided over by a salaried officer appointed by the Chancellor, and required by Act of Parliament to be a barrister of at least seven years' standing, who decides both law and fact without appeal, with the privilege, to either party, to demand, as of right, a trial by jury where the sum in controversy exceeds five pounds, and subject to the discretion of the judge, in cases of less amount. The jury, if one be called, consists of five jurors only, and not twelve. Counsel are not heard except at the special request of the judge, who may desire, in difficult cases, to enlighten himself by means of discussion of the points involved. Courts are opened, at least once a month, in every place in the district where they are appointed to be held. Minors are allowed to sue for wages, and each party to tell his own story; and other provisions of various kinds exist for the simplification of justice. From these tribunals causes may be removed into the superior courts, by leave of a judge, where the demand is above five pounds; and should the parties, notwithstanding the opening to them of the County Court, go before the superior tribunals, they lose their costs, unless the judge certify that the action was a suitable one to bring before him. These sixty lesser courts, which thus withdraw from the King's Bench, Common Pleas, and Exchequer the great mass of small suits, are, with the addition of three judges to the Common Law and three to the Equity Courts, the whole modern measure of relief to the administrators of English justice. A large burden, an incredible one according to our rule, still lies upon the judges, and mainly upon those of the three Common Law Courts, which, after allowing for the labors of the Equity, Admiralty, and Ecclesiastical tribunals, and for the lesser civil business done in the County Courts, and the lesser criminal business which, in England, is done in the Borough Courts, Recorders' Courts, Quarter Sessions, and various local jurisdictions holding cognizance of the inferior degrees of crime, have it upon their hands, the hands namely of fifteen individuals only, to dispense justice to the seventeen millions of inhabitants who crowd and swarm in the southern portion of the island of Britain. The Chancery Courts take under their care the equity business, including bankruptcy and insolvency; the Ecclesiastical Courts, under theirs, church cases, testamentary cases, and marriage and divorce cases; the Admiralty takes the maritime cases; the inferior criminal courts, the lesser criminal business; the County Courts, the lesser civil business. The rest is left to the common law judges.

And this (according to the Pennsylvania judicial tariff) enormous task they not only perform, but they perform it carrying round justice to men's very doors, for they visit and hold courts four times a-year in every county. There are fifty-two counties in England and Wales, and these being divided into circuits, the fifteen judges ride through the country, and hold every year two civil courts and two criminal in each county. In trying criminal issues, they are bound to clear the jails as they go, so that if the lesser courts chance to have permitted their business to accumulate, the judges are compelled to do their own work and whatever may remain of the others also. Such is the labor done by the English judiciary since being lightened of part of their burden. We will enumerate, under their respective titles, the existing courts, and then endeavor to compare them, in relative force, with our own. They are:—

I. The County Courts established by Act of Parliament of 1846, having jurisdiction of personal actions, under twenty pounds, with certain exceptions, as, for example, where title to real estate comes in question, or where the plaintiff lives more than twenty miles distant from the defendant, or where the Superior Courts choose to take cognizance of the cause.

II. The three great Common Law Courts of King's Bench, Common Pleas, and Exchequer, each court since 1830 having five judges instead of four.

III. The Courts of Quarter Sessions, Recorders' Courts, and Borough, and other local Courts, exercising the inferior criminal or Quarter Sessions jurisdiction.

IV. The Court of Admiralty with one judge, and maritime jurisdiction.

V. The Ecclesiastical Courts with three judges appointed by the prelates, with jurisdiction of marriage, divorce, church, and testamentary or administration cases.

VI. The equity courts held by the Chancellor, Master of the Rolls, and three vice-chancellors. The vice-chancellors, like the fifth judge in the Common Law Courts, being of recent date, the

first of them appointed in 1813, and the two others in 1840; making the modern chancery force five judges instead of two.

VII. There is beside these, a court in the House of Peers, but which, having jurisdiction only of appeals from appeals, as if, for example, our Senate heard appeals from the Supreme Court in cases carried thither by appeal from the Common Pleas, need not be taken into account, for we allow no such second appeal in Pennsylvania. Nor need the court held by the Privy Council, which hears appeals from colonies beyond seas, for we have no colonies; nor the Insolvent Courts, inasmuch as, having abolished imprisonment for debt, we have no insolvency, or next to none. Nor the Bankrupt Court, for we have no bankruptcy. Insolvent and bankrupt business is, however, for the most part, done in chancery. Nor need the Courts of Request (if they yet exist), for their jurisdiction being within forty shillings, they are, as it were, absorbed by the County Courts.

VIII. There are also the justices of the peace, but they have no civil jurisdiction. They sit as part of the bench of the inferior criminal courts which we have mentioned.

Add to these the occasional barrister, who is associated in commission with the judge of the upper courts, when he goes the circuit, in order to serve (which is of course very rarely), in case of the illness or death of the judge, or some very unusual pressure of business, and we have before us the entire judicial strength of England and Wales.

To contrast, then, the relative numbers of the English judiciary, and of those of Pennsylvania: if their establishment corresponded with ours, court for court, it would be only to take the English population and the number of their judges, and our own population and judicial force, and compare them together. But they have in England those inferior criminal courts, of which we have spoken, and which cannot, in their separate organization, be likened to anything existing in Pennsylvania. With us the same judge before whom an ejectment is tried for a tract of land, or a murder in the first degree, also tries a larceny. This, however, is but a small obstacle in the way of the comparison. While nothing could be wider apart, in many particulars, than the judiciary, as organized in England, and that of Pennsylvania, yet they agree in this, that three English Courts of

Common Law, and their Chancery, Ecclesiastical, and Admiralty Courts, together, transact the business of the country for them, as in our instance, do the District Courts of counties, the Courts of Common Pleas, and the Supreme Court, with the aid of the three Federal judges, for us. The difference is in the Quarter Sessions cases, which in England, but not in Pennsylvania, come before tribunals distinct from the Superior Courts. All, then, which is necessary to the comparison, is to measure the relative amount which the Quarter Sessions' business in Pennsylvania bears to that of all the rest of the judicial business done by the judges holding these courts, and to make allowance accordingly. If the Quarter Sessions occupied nearly all the time of the various judicial districts of the state, then we would be ready to admit that the English upper courts, having that department of business attended to for them by the inferior tribunals, ought to have very few courts for what remains of the administration of their justice. If we found that this portion of it consumed nine-tenths, for example, of the time of our judges, we would be obliged, in comparing with England, where the upper courts are relieved of it, to admit on this score that we would be entitled relatively to population to nine-tenths more upper courts than they have in England, where all but one-tenth, as we would then reckon it, of judicial labor, was transferred to the shoulders of the inferior courts. We omit from the estimate the English County Courts, and our own corresponding jurisdiction of aldermen and justices of the peace, counting only the Superior Courts of either country; giving ourselves in this immensely the advantage, inasmuch as there are but sixty of the twenty pound judges in England, while, of the one hundred dollar judges in Pennsylvania, there are twenty-seven hundred and forty-eight. For the sake of parallel, therefore, we will eliminate such portion of our judicial complement as corresponds in force with those inferior English criminal tribunals, the like of which we have none in Pennsylvania. We will arrive at the means of comparison, by omitting an entire third of our Common Pleas' judges, on the concession that our Courts of Common Pleas are occupied a third of all their time in holding inferior criminal courts, that is, that Quarter Sessions business demands one-half as much of their attention as does that of the Common Pleas, the Orphans' Court, the Register's Court, and Oyer and Terminer, put together; and that, it will be admitted, is a liberal allowance. Leaving out, then, one-third of our law judges of the Common Pleas, to be set against the English petty criminal courts, we have still in Pennsylvania,

Judges of the two District Courts of Alleghany and Philadelphia - - - - - - - -	5
Judges of the Supreme Court of Pennsylvania - -	5
Two-thirds of the twenty-four President Judges of Common Pleas - - - - - - - -	16
Two-thirds of the three law Associates of the Common Pleas of Philadelphia County - - - - -	2
Judges of the District Courts of the United States for eastern and western Pennsylvania - - - -	2
The Judge of the Supreme Court of the United States who sits here and in Washington, gives us less than his whole time. We will omit him entirely - -	0
	30

Being thirty judges for two and a quarter millions of people. While in England they have

Judges of the three Common Law Courts - -	15
Judges of the Equity Courts - - - - - -	5
Judges of the Ecclesiastical Courts - - - - -	3
Judge of the Admiralty - - - - - - -	1
	24

Being twenty-four judges for seventeen millions of people. A most extraordinary difference. In the new and comparatively unsophisticated Commonwealth of Pennsylvania, we have thirty judges to two and a quarter millions of inhabitants, while twenty-four judges serve for seventeen millions in the ancient kingdom of England, and principality of Wales, where, by reason of their numerous statutory offences, the crowded state of population, the inequality of rank and fortune, and the consequent uneasiness and misery in which a great portion of the people live, crime abounds; and where the enormous accumulation of wealth, and highly artificial state of society, help us to some idea of the amount of civil business that must be, for the judges, in the course of a year, cut out by such a population. Surely England must be Judges' purgatory, or Pennsylvania their paradise. There is no going amiss in seeking the points of contrast. We have omitted from the list of judges the English County Court magistrates, and our corresponding petty jurisdiction of the aldermen and justices. Include them, and we find our

neighbors over the water satisfied, when they come to organize twenty pound courts, with sixty of them for the whole kingdom, while we superbly furnish ourselves two thousand seven hundred and forty-eight functionaries, each of them holding a hundred dollars court. Let the rule of three be applied to our judicial economy. If a state with seventeen millions of people need but one Admiralty, three Ecclesiastical, five Equity, and fifteen Common Law judges, in all twenty-four, how much less than thirty judges will serve for a state whose inhabitants amount to but two and a quarter millions? The County of Berks has a judge of its own, the County of Schuylkill a judge of its own, and the County of Philadelphia so many, having seven, beside the Federal Judges, and those of the Supreme Court, and the justices of the peace, and aldermen, who, in Philadelphia, amount to not less than eighty, that the number of the courts has, among its other ill effects, a most serious and a highly prejudicial one upon the composition of juries. The citizen is so frequently called away to serve in the jury-box, that a large portion of the business men, and who make the best jurors, to avoid this oft-repeated conscription, resort to means by which they are enabled to evade service altogether, to the great and manifest detriment of the administration of the justice of the district. In short, while we have thirty judges, by the English standard we are entitled to but three and three-seventeenths. We actually have more than nine times too many for our population. Let us figure to ourselves the condition of a farmer who, having work for three hands, should find himself with twenty-seven, of a large tavernkeeper in Pittsburg or Philadelphia, whose waiters, cooks, and porters are increased from their complement of thirty to two hundred and seventy; of an Eastern manufacturer, who with work for six hundred boys, girls, and men, is surrounded with five thousand four hundred! Nor should it be forgotten that population is not alone the basis on which to reckon litigation. We ought to have much fewer lawsuits in Pennsylvania, in proportion to our population, than they have in England, though we are aware there might be thought room for question on this head. But we conceive that the rule is a sound one, that the more artificial the society is, the more cramped and constrained its condition, the more policied the state, the greater must be its proportionate amount of litigation. For example, in England they have their entails and settlements, their provisions for younger sons, and their prodigious wealth for the eldest, they have their poor establishment, with its million or two of paupers, their Church esta-

blishment, with its ten thousand parishes, its couple of dozen bishops, and its forty-five millions of income, and their government with its nearly two hundred and fifty millions. They have hundreds and thousands of privileged persons of all degrees in the scale, from a man privileged to hereditary legislation, to one privileged to shoot a partridge on his own ground; they have their tracts of country, which are privileged too, their manors dating from Edward I., covered with prescriptions, customs, and inherited peculiarities; the whole kingdom, animal and vegetable, is divided and subdivided, in artificial classification. It would be strange if, where so many men and things are thus twisted from their natural positions and relations to each other, it were not necessary in order to keep them in place, or rather out of place, to use more governing force of every kind, judicial included, than in a Commonwealth as new, as simple, and as natural as ours. If lawsuits then may be supposed to be in a ratio not of population alone, but of population compounded with property and policy, the arithmetical argument against us, according to the English standard of judicial labor, seems to have no bounds.

Had we the means before us to be derived from minute books and records, their evidence would probably show that most of the local courts of Pennsylvania are actually in vacation a large portion of the year; although the number of day's sessions is far from being a test of judicial labor, for a judge may sit three hundred days of the three hundred and sixty-five, and do little business. The judge, who sits but few days in the year, yet may work fairly up to his duty, his district affording a fourth, or a tithe only of the necessary amount of litigation to give him employment, while the judge, who sits the year round, may be able at the end of it to exhibit, not much result. There could, therefore, be no satisfactory proof of the disproportion of the judges to the suitors, after leaving that which we have adopted of comparison with other countries, save in the kind of scrutiny of their affairs, which is, if not beyond individual reach, at least too great a task to assort with individual convenience; and which, after all, by reason of its intricacy and complicated details, must be less available, positive, and conclusive, than that derived from contrast with the courts of other countries.

To account for such monstrous disproportions between the number of workmen and the work, and which seem at first to be incredible, we must fall back upon the familiar fact, that necessity, industrious

habits, and close application produce results, which in the absence of those causes are never conceived of. The District Court for the County of Philadelphia is not open as many days of the year as it used to be, and yet it would be no exaggeration to say, that many times more business is done in that court now than formerly. It would be vain to insist upon the English habit of preparing cases out of doors, and their other supposed facilities for the dispatch of business in court. The answer would be that, if our judges were compelled to put their shoulders to the same amount of labor, facilities and system would soon follow. They follow in all other departments, whether of public or individual industry and enterprise, the courts being the almost sole exception. We are nowhere else to be found in the same sort of vocative. Nobody ever heard that an American ship or farm needed more hands than an English one; that if anything be to be done in the United States, we put two, or ten, or twenty men to the same work, whether it pertain to mind or matter, that would be done in another country by a single individual. So far from this, we are capable, to a proverb, and want only to give ourselves the opportunity in order to be convinced, that on the bench, as elsewhere, we need fewer persons in proportion to the work that is to be accomplished than they do anywhere else. Our difficulty lies in the slackness of our organization. We have so botched our system that, while an English judge is compelled to work like an American lawyer, an American judge, we speak of them as a class, with a saving of individual exceptions, works about as hard as any English country gentleman does who happens to have an estate to take care of. In Pennsylvania, instead of reckoning up what is to be done, and then giving ourselves as many judges as are necessary to accomplish it, we increase their numbers with the increasing calls to supply places to those who stand in need of them. In England, they count the bench so close that they cannot spare a judge for a single court. Hence, the well known habit, when he is dispatched to ride his circuit, of joining with him in commission some barrister of respectable standing to take his place in an emergency, for, should he fall sick, or any accident befall him, the business of the country would suffer unless there were a person at hand to step instantly into his stead and carry it forward. They can but just keep up with their work by dint of the constant industry of every man among them, and if the aid of any one individual should be withdrawn for even one court, justice would be liable to fall be-

hindhand, and there to remain. For example, Sergeant Talfourd, known to us as the author of Ion, was lately appointed to the Bench. The judge whose death created the vacancy died perchance just as he was setting off on his circuit, and as it is not practicable to provide a new judge on twenty-four hours' notice, the lawyer joined in commission with the deceased judge, rides the circuit until Mr. Talfourd can be appointed and take his seat. In Pennsylvania, so rich are we in judicial treasure that, if five and twenty judges were to die of nothing to do the same day, there would be enough of their lamenting brethren left to bury the dead, and hold all the courts in the state beside.

It would be an ungrateful task to attempt to enumerate half the ills which arise from this mob of judges, this school with ushers, tutors, and masters out of all proportion to the scholars, this ship with three sailors to every half ton measurement. No man ever was a man of business, or excelled in any department of affairs, no matter what, who had but an hour and a half's work for the whole day. No man thus meagrely employed, how great soever his merit, ever made his fortune at anything, ever pleased himself or satisfied others. If we had only so many judges as could accomplish, by learning, talent, and industry, the administration of justice, we never would see such a thing as a judge not possessed of those qualities; but if we make by numbers judicial place at the same time so cheap and so easy that any half-taught, slip-shod lounger is capable of it, the appointing power, be that executive or people, will occasionally give us judges measured to the gauge of the office they are destined to fill. If a quarter racer's work is all that is to be done, they will send us quarter racers. The demand it is which regulates the supply. Give us for our establishment three or four judges instead of thirty, and no inefficient man would ever come upon the bench. In England, they never have an entirely incompetent judge, because entire incompetency is under their arrangements a judicial impossibility. To an English lawyer who approached as near the borders of uselessness as do some Pennsylvania lawyers who have been promoted to the bench, the essay to guide one of their locomotive engines going sixty miles an hour, would not be more absurd than the attempt to conduct the business of a court organized upon their system of weight and speed. If we multiplied our present number of judges by four or five or six, and thus reduced the bench at once to a state of idleness and

nothingness, the appointing power would supply us accordingly. We so make the bench that the most insignificant person may hope to get through with its duties, and then we wonder at the executive now and then giving us a man who is exactly fitted to them. We ought to be astonished at his giving so many who are above them.

It is easy to comprehend that the people of Pennsylvania should ask some relief from a course of legislation, the results of which we see in a dissatisfied bench, a complaining community, and two thousand eight hundred and eighty-seven judges. The Constitution has vested the judicial power in a "Supreme Court, in Courts of Oyer "and Terminer and General Jail delivery, in a Court of Common "Pleas, Orphans' Court, Register's Court, and a Court of Quarter "Sessions of the peace for each County, and in such other courts as "the Legislature may from time to time establish." That is to say, it declares there shall be one governing tribunal, and that each county shall have both civil and criminal justice brought to its own doors, and shall not be compelled to visit distant parts of the state in search of it; and perhaps, we say perhaps, if one court could hold Common Pleas, Orphans', Register's and Quarter Sessions Courts, and Courts for Oyer and Terminer for each county in the state, the Constitution would be satisfied. Certainly it is not the fault of the Constitution that our courts are as numerous as they are, and render impossible, until we cut off from our establishment some of its redundancies, a satisfactory judiciary. The third Section of the fifth Article, it is true, declares that "Not more than five Counties shall "at any time be included in one judicial district organized for "said Courts," namely Courts of Common Pleas. But granting it to be necessary under this section that each judicial district should have a separate judge, a concession which we are not disposed to, still it is plain that, had we not formed our judicial districts of much less than five counties each, our judges would not be half as numerous as actually they are. We have also exaggerated this constitutional necessity, if it be one, by increasing the number of our counties. Whether we might under the existing Constitution reduce ourselves to a single court, we are not prepared to say, nor is it necessary to discuss that question. If we do not now possess the power, it could be had for the asking. And where might we not stand, what authority, what ascendant would not have the decisions of this state, so happily situate for influence and dominion among her sister commonwealths, if we had but a single court? But, instead of one court composed of first-rate men, well

paid and of universal esteem, we have chosen to establish twenty-seven, each ill paid, undervalued, and with few exceptions reproached and complained of. Instead of one bar of the tone and talent which would be commanded by a practice having the whole state for its basis, we have some five dozens of them, of hardly any character at all, however individually respectable the persons who compose them. Instead of the law being uniform, "as broad and general as the casing air," the same in Pittsburg, Philadelphia, and Harrisburg, it is perplexed and provincialized by twenty-six sub-interpreters of it, each gloriously independent of all the others, constantly differing among themselves, and able to settle their disputes and relieve the community from an interval of awkward and injurious suspense, only by a reference to that supreme tribunal before which the question might just as well have been heard originally. There is one point of our law upon which, as we are credibly informed, five Courts of Common Pleas have lately decided in five distinct and different ways. The question has not yet been presented above for final umpirage upon this diversity of commentators below. When we shall have thirteen courts and a half instead of twenty-seven, our cure will be begun, and when we shall have one only it will be complete. Not that we mean to assert that the law is necessarily confused by the use of inferior courts, but by the abuse of them in the unconscionable multiplication of their numbers; and that, with a population not greater than that of Pennsylvania heretofore has been, and such as for many years to come it will be, a single court would suffice for all the larger civil and criminal business of the state, and that, using one instead of several or many, we should find ourselves with better law, and a more satisfactory system of justice. It is to our superfluity of lesser courts, not to their making part of our establishment, that we mean to object. And certainly, if there be any virtue in comparison, we have shown that a people whose tribunals ours have been copied from, whose laws are the same in their source and in much of their detail with those of Pennsylvania, whose principles and precedents, and even whose practice, we daily quote, and who are at the same time a less lively specimen of the common race than ourselves, and therefore ought to work slower and not faster than we do, contrive with the same force to accomplish more than nine times as much business. From hence we have argued, and we submit the question to those who are wiser than we are, that the first and main fault of our judicial organization lies in the excess of

its members over the means of giving them useful employment. A fault not to be cured by any such application as this which has been proposed from Harrisburg for our consideration. Leave men idle, and mischiefs must come which even the magic of election cannot charm away. There is no enchanted herb which grows in the garden of the people to enable us to dispense with diligence and toil. The system of employing a public servant for the fractional part of a year, and leaving him the rest of it to himself, was well enough at the foundation of the province, when, as in all new societies, the same individual lent an occasional hand to a variety of objects; or even when our present government was formed in 1790; but we have long since outgrown such expedients. We need now, and we can have an influential judiciary on no other terms, judges who will devote, with few and short vacations, their laborious and undivided attention to the administration of justice; to be rewarded, we may add, and that would directly follow, by adequate emolument. Men half paid and half employed cannot even stand with the rest of their fellow-citizens as becomes a magistrate who is placed in authority over them. When in 1790 the judiciary was organized of its present loose and facile habit, the state was an embryo, insignificant community, with a population little greater than that of Philadelphia at the present time; large towns, now the flourishing seats of extended commerce, then had neither habitation nor name; our mining and manufacturing resources and productions were unimagined; newspapers for every village, canals, rail roads, and telegraphs for almost every county, with the teeming life which follows in their wake, these things giving birth to multiplied population with its less governable elements, its new combinations, its higher ambitions with higher prizes to reward them and harder struggles to obtain them, and adding beyond measure and in every variety of way to the bustle and business of men's existences, have created a new world for Pennsylvania, and with it necessities which in earlier days were unknown. To rule the child and to govern the man are two different things. An acquaintance informed us, a few years since, that he had held, and not a great while ago, for he is a man not now in advanced life, the first court of justice opened in Ohio. The court sat under a tree; and was, as our informant assured us, a very orderly, and from our knowledge of the judge, we will venture to conjecture, that it also was a well administered tribunal. But if the Supreme Court of that State of Ohio, now represented in Congress by twenty-one members in the Lower House, should any fine morning adjourn itself

to some neighboring orchard, and have writs of error argued there, it would soon discover the difference between its present and its former self. In 1790, a Pennsylvania judge with a calendar before him of a handful of issues, and a handful of lawyers to try them, who sate, through a few easy days or weeks of the year, was in fair keeping with the manageable society whose laws he administered.

We have thus endeavored to explain the position that we are overstocked with judges; and we now proceed to the other suggestion: namely, that the Legislature has left our judiciary without practical check or control. They have not only bestowed on us twenty-seven courts; but, after giving birth to this numerous offspring, they have omitted to provide them with any stimulus to duty, or spring to action, with that motive to industrious application always essential where useful labor is looked for at men's hands, but doubly necessary, where numbers tempt them to idleness and inefficiency. If there be any means short of ignominious expulsion from office, a recourse to be had only on the rarest occasions, provided for the enforcement of judicial good conduct in this State of Pennsylvania, we are ignorant of it. The Constitution, having established a judiciary, it was the place of the law-making power to see to its proper working. If the Constitution, instead of seating the judge on the bench for life or years, under executive appointment, had ordained his election at the polls quarterly, still, it would be for the Legislature to furnish those means of compulsion to diligence and good conduct, which they have chosen to omit, leaving us to rely upon the frail dependence of individual ambition and good will. Once appointed, the judges have little to hope and less to fear. From our system the state of rewards and punishments is left out. What do the judges care for the Governor, General Assembly, and people of Pennsylvania? Independent, we grant they ought to be, but they are independent and irresponsible too. Why should a judge be diligent, whose office and whose emoluments are beyond the reach of any power, but that of impeachment; a force which has no application but to crime? Why toil uncompelled? Why be strenuous in his duty, when there is none to answer to, should he leave it unperformed? The bench has long been used to nod in occasional caricature; but it was reserved for us to establish its unquestionable privilege to go permanently to sleep. In no other country than this, has it ever been attempted to govern

with one department hanging separate and loose from all the rest, and moved by its own good pleasure only. In England, whose predicament resembles that of certain of our incorporated companies, in which the influence and assets together have slipped into the hands of some half-dozen directors, who pocket the profits for themselves, and leave the stockholders to starve along as well as they can, the judge, when he is elevated to the bench, becomes the member of an oligarchy, of a close body, a fortunate, happy few, among whom there is responsibility as there is in a camp, and, for the same reason; it is a necessity, and a condition of their existence. Without it, their guild could not hold together for a year. Their institutions grow under glass, and not like ours, in the open field. And they have direct control there beside, and that of a most potent sort; the minister of the crown who has appointed the judge, holds also the power of removing, checking, punishing, and reproving him. He has, at his back, the majority in parliament, and parliament is omnipotent, so that his relation to all serving under him is what that of the Governor of Pennsylvania would be to our public functionaries, if, besides wielding the patronage of the state, he carried every measure through the Senate and House which he proposed to them; and if, moreover, there were no written constitution to prevent his proposing what he liked. In more than one instance, offending judges have resigned to avoid his turning his majority upon them. He can promote and reward them also. A judge wants to be chief-justice, a chief-justice wants to be a peer, a peer wants to be advanced in the peerage; when advanced, he wants more money to support his new dignity; when he retires, he wants a pension; and his wants of court favor in general, of fees, jobs, and places for his friends and poor relations, at the hands of a government possessing an enormous patronage, and raising, out of the many, fifty millions sterling every year to be spent among the few, are endless and incessant. He looks up, in short, to the minister with that feeling which rises in his bosom, when he reflects upon the joys which await that faithful servant who labors, in whatever department, for the welfare of the island as interpreted and understood by the first lord of the treasury. Every sixth man in the whole House of Peers is sprung from a law stock. It is but a few years since the judges were, through executive indulgence, allowed to add, by fees and by the sale of places, to the amount of their annual salaries. That grasping potentate, Lord Ellenborough, refused eighty thousand pounds sterling for a place called the chief clerkship, the gift or

sale of which was a permitted perquisite as chief-justice of the court over which he presided, and pocketed the annual profits himself. Sir William Scott had, as judge of admiralty, beside his salary, perquisites amounting to between seven and eight thousand sterling a year, and what is not a little remarkable is, that they were incident to maritime hostilities, and ceased with the termination of those long wars, to which his judicial opinions and decisions lent such unhesitating aid. The jobbing of the great seal to the judges, putting it in commission, as it was called, instead of handing it over to a chancellor, has yielded from time to time large profits to the fortunate individuals to whom this capital prize has been temporarily committed. The opposition in parliament, always on the look-out for something to reproach the administration with, which are held to answer for the faults of those serving under them, no matter in what capacity, lends its assistance to control the bench. Chancellor Eldon's imputed delays of justice were the subject for a succession of years of the most fierce, violent, and effective political assaults upon the party with which he acted. In the more despotically governed regions of the world, judges are necessarily under control. In Russia and in Turkey, they tremble like the rest of their fellow-subjects before the Sultan or the Czar; and in all countries, but ours, they are under some censorship or other. We alone have attempted the voluntary system; one, by which the judiciary, so long as they keep without the limits of high crime and misdemeanor, such as would bring on impeachment or address, is left to its own unaided sense of duty to the citizen. In other words, we have been guilty of a political absurdity of the first order; for it is plain that no institution can be relied on, of which the men who compose it, be they judges or not, are answerable only to themselves. It is absurd enough, when applied to Chief-Justice Marshall, to Chief-Justice Tilghman, to any political servant of whatever experience, virtue, and elevation. But when we see the halt and the blind, the most deficient public characters, judicial players, who, "having neither the accent of Christians, nor the gait of Christian, Pagan, or man," chartered into divinities and declared irresponsible, it becomes to the last degree ridiculous. Our skein of judges is a mingled yarn; some good, some bad, some very indifferent; and we find ourselves treating with this sort of confiding reverence the very smallest and least reliable personages. There is impeachment for high crimes and misdemeanors; there is address of the two houses for offences short of the mark of impeachment;

but can any man tell us what practical remedy is provided by the laws of Pennsylvania for the case of a judge whose lack of qualities, or whose neglect to use them, makes his administration of justice a blister and a nuisance? He is universally condemned by all who have the opportunity of passing judgment upon him; but there he sits through his term of office, and no man, such is the law, even hopes to be rid of him. If we had as many constitutions for the state as we have judicial characters in it, and we have counted those at nearly three thousand, we never would be satisfied with our judiciary while they remain irresponsible for the long catalogue of lesser sins, which now they commit with impunity; and while content that they are not vicious or corrupt, we leave ourselves without the means of enforcing our claim upon their application to business, upon their patience, their diligence, their amenity, their energy and despatch. These virtues must be enforced. Necessity is the mistress-mother of results; let us essay a little compulsion. We have tried the honor of the bench and the dignity of the bench long enough to satisfy the most incredulous, that judges are like other men; and that, while there are many of them, as there are many high-mettled animals which, moved by honor and dignity, go without whip or spur, yet there are also many that will not, and that compulsion is no more to be dispensed with in the case of men than of horses, no more in the case of the judiciary than in the case of a stage-coach. If we were to elect, at the polls, to-morrow, the best magistrates that ever administered justice, and just pushed them into their seats, bidding them be learned, honest, just, industrious, and wise, but, without passing any law for enforcing the use of these, their various accomplishments, how long do we suppose it would be before they made the precious discovery, that neither their quarter's salary, nor their tenure of office, had much to do with their exercise of them?

Here we do stand in need of radical reform, and, happily, it may be attained in a variety of ways. There can be no difficulty in devising the engines of compulsion; but there is one which is so immediately at hand, so easily experimented with and thrown aside, if not found to succeed, so much in keeping with our institutions, so unobjectionable we should suppose to the Bench itself, and so different from the awkward, ill-adapted machine which is now proposed to us, that it seems at least to be worth the trying. And that is to bring every detail of judicial proceedings directly under the public eye, and draw them into such a glare of publicity, as to make it impossible

that a judge should neglect his duty or be ignorant of it, and retain his seat. Such a thing has been rarely witnessed in Pennsylvania as a member rising in his place in the Legislature to complain that, in his county, justice was negligently administered, and moving for a committee of inquiry; and the reason is, that the party in power not being to be assailed, or the party out of power to be advanced, through the sides of the judges, a politician seldom finds it worth his while to trouble himself about them, and abuses consequently are suffered to accumulate, until there is a loud and general call, on all parts, for reform. The executive is watched, and the Legislature too, each side mutually watching the other. No trip can be made there without being the subject of abundant outcry; but the conduct of the judiciary—of what earthly use would it be to a politician to trouble his head about that, and bring about nothing but a better administration of the laws in his district! Nobody would hear of it. His labors would be thrown away; they would not tell upon his political prospects. When it comes to the éclat of an amendment of the Constitution, then, indeed, there is something to be gained; but he might devote himself day and night to useful service in this department for years, and advance neither himself nor his party one single jot. The press exercises no more censorship over minor judicial offences than the Legislature does. The public knows little about them. We undertake to say, that of the various classes of persons that are before the public, either as servants of that public, or as individuals who cater for it, there are none whose real merits and demerits are so little known to the community at large as those of the judges. If a judge received a bribe, we would hear of it; but of his habits of business, however defective, of his sheer incompetency for his place, we have little or no information from any quarter. Judges, of the most useful and valuable properties, serve the public for their term of years, and then are dropped at the end of it, leaving the society which has profited by their labors ignorant of the loss they have sustained; while others, without either industry, capacity, or good-will, contrive to escape censure. Let us correct this by forcing the qualities and conduct of the different courts into common notoriety. Let us bring before the public, in official statements, at short intervals, and before the Legislature, at their stated meeting, in the same form, the particulars of the business done in each court. Every department of the government reports itself annually to the representatives of the people, the judiciary excepted. We are informed of the condition

of our finances, of our militia, of our internal improvements; and, from Washington, of that of our army and navy, and our foreign relations, at the opening of every session. Why should not the judiciary report too? Why should we not know how the law has been administered during the past year—whether the dockets are clogged—whether justice has been denied or delayed? In a popular government, it can never be amiss to call the servant to frequent account before the people; to give us laws by means of which he is subjected to the minutest inquisition. And would not any man, deserving to fill a place on the bench, prefer this simple republican publicity, and the responsibility which is consequent upon it, to coming down from his seat to canvass for votes? At Rome, the place of the censor was to see, not so much that the enactments of the Senate and people were obeyed, as that their tone, spirit, and moral were observed and complied with, in the life and conduct not only of public functionaries, but of private citizens; and of all her institutions, to that of the censorship the profoundest writers and thinkers upon her policy and government have agreed in attributing the astonishing career of the mistress of the world. The Chinese, who are now, within certain limits, the wonderful people of this planet, and may be supposed to know something of government, have laws, which descend to the moral and social duties; laws to compel industry, laws to enforce good manners, filial affection, and the whole circle of the virtues and proprieties of life. In some of them, they fail where circumstances are stronger than policy; in many, they are successful. We have had in this state, to come down to an illustration in little, some very negligent prothonotaries of courts; but even those of them who seemed to toss their papers into a bottomless bag, or to keep them stacked up in utter confusion, were never known to permit the judgment index to accord with the otherwise universal disorder which reigned among their records; for there they were watched and supervised by every holder of a search certificate; there there was censorship, and a slip would be sure to have its consequences. Our fellow-citizens of Maryland have an act passed in 1809–10* entitled "An "Act relative to the judges of the Court of Appeals, and of the "County Courts," the preamble and first section of which run thus:—

"Whereas, the speedy administration of justice is highly condu-

* 1 Dorsey's Laws, p. 596.

"cive to the prosperity, and is essentially promotive to the best in-
"terests of the good people of this State, and for the attainment
"of this most desirable object, it is requisite that all judges should
"be punctual and regular in the discharge of their important official
"duties; to the end, therefore, that this General Assembly may be
"enabled to form a correct opinion of the conduct of the judges in
"this respect, and to meet the responsibility which attaches to them
"as the grand inquest of this State,

"Be it enacted by the General Assembly of Maryland, That the
"clerk of the Court of Appeals for the Western and Eastern Shore
"respectively, and the clerks of the several county courts, be and
"they are hereby required and directed to report, annually, to the
"General Assembly, on or before the first Monday in December, the
"duration of every term or session of their several courts, and the
"number of days that the judge or judges of such court shall re-
"spectively attend for the performance of his or their official
"duties."

Even in oligarchal England, where public men are not, as they are in Maryland and Pennsylvania, servants of the people, but of the king, and where notoriety is far from being the cue of the government, there is an Act of Parliament of 3 and 4 William IV., ch. 94, the seventeenth section of which provides, in regard to Masters in Chancery: "That each of the said Masters in Ordinary
"of the High Court of Chancery shall, within the first four days of
"Michaelmas Term, in each and every year, present, or cause to be
"presented, to the Lord Chancellor, a report in writing, under the
"hand of such Master, stating the days on which he shall have
"attended at his office for and during twelve months preceding such
"return, in the performance of his duty, specifying the number of
"hours occupied in each of such day's attendance, as aforesaid; and,
"further, that each such Master shall annex to such his report, a
"list or schedule, to be signed by him in like manner, of the several
"causes, petitions, or matters of every description, then pending in
"his office, showing the then state and stage of the same respect-
"ively, designating each cause, petition, or matter, by the name or
"names of the party or parties thereto, or some of them, with the
"name or names of each solicitor engaged therein; and thereupon
"it shall be lawful for the said Lord Chancellor to make and issue
"such order for filing or depositing, and otherwise giving publicity
"and access to such list or schedule, as he in his discretion shall
"think fit." And these Masters in Chancery, thus brought under

the diseipline of the cloek, though like our own masters and auditors, without judieial rank, like them, are in truth, judges, with an appeal to the court. They are sub-ehancellors, and the places they fill, eagerly sought by persons of high eonsideration, are supplied with a salary of twenty-five hundred sterling a year. Let us pass for ourselves in Pennsylvania an act going beyond the Maryland and English statutes, and requiring the eourts to print and publish at the end of eaeh term, tables for the public eye, and for the use of the Legislature, showing how many days the judges sit, and how many hours of the day, and a full detail of all the business they aeeomplish, or omit to aeeomplish. For example, a eourt meets on the first Monday of September, having so many eauses on the motion and argument lists, and on the first Monday of Oetober the judges sit for jury trials with so many eauses on the trial list. On the first Monday of Deeember, the day when the September term ends, let the aeeount of business be taken. The prothonotary reports that the argument list, at the beginning of the term, consisted of sueh a number of eases, of whieh so many were verdiets subjeet to the opinion of the court, and so many were rules for new trials, of which so many were disposed of by judgment, and so many by granting new trials, and so many by refusing them, and so many of them lay over undisposed of for sueh and sueh speeified reasons; so that of the list of eases for argument, sueh a number have been terminated by final judgment, so many have been ordered for another trial, so many have been referred baek to the auditor, and so many were not reaehed. That the trial list taken up the first Monday of October, eomprised so many suits, that of those so many have been tried and gone to verdict, while in so many juries were ealled and diseharged, and so many remain untried, for sueh and such reasons, namely, these, beeause they were not reaehed; those, beeause they were sworn off for the absenee of witnesses, &e.; thus aeeounting for all the issues on the list. That Judge A. sat for jury trials on the 1st of October, from ten A. M. to four P. M., on the 2d of October, from ten and ten minutes A. M. to two P. M., and so on to the end of the term, giving the time in hours and minutes of eaeh day oeeupied in judicial business. Debit the judge, as in a merehant's books, with eaeh ease as it eomes from the doeket to his ealendar, and eredit him with it only when the ease leaves his court finally disposed of. There is not, we believe, one evil attending the present administration of justice, which would not, by this means, be abated

or cured. If the public had before it, in plain shape, all the proceedings of the courts, the effect would be to bring the judges into responsibility to the public, and into comparison and contrast with one another. How could a court in one county do three times the business, sit three times as many hours, try three times as many causes as the court of an adjoining county, without the attention of the public being attracted to such an anomaly, and the remedy applied to it? Could a court with nothing to do continue to exist? Could a judge whose business was in arrear continue to keep his seat? Would not a system by which the virtues as well as the faults would be mirrored of each judicial character, and reflected into every corner of the state, at least bring before us the facts which are needed to enable us to carry out judicial reform? Make known a man's acts in their veritable detail, and if he be a public man, employed and paid by the public, he must conform to their standard. If the courts were required to publish such particulars of their administration at the end of every term, and to lay them before the Legislature, to be referred to the Judiciary Committee, at the opening of each session, notoriety would beget responsibility, and responsibility industry, and every useful result. And if it did not, the Legislature would be able to use their constitutional power of address, which now, for all practical purposes, is a nullity. But we depend upon the qualities of the men that fill seats on the bench, instead of a code of regulations under which none could venture there without being fitted for the place, or remain there to trifle with us. Governments ought to look to systems, and not to depend on individuals. If, by due supervision, and just and reasonable censorship, applied to a bench whose numbers shall bear some proportion to the amount of our business, we enforce labor, all else we desire at the hands of the judiciary will follow after. Those who are constantly, usefully, and laboriously engaged, are not often complained of for anything. If we possessed a hard-working judiciary, such a resolution as this, of the 1st of March, and 2d of April, 1849, never would have been heard of. And when we shall have tried the virtue of full employment, and plenary, but not odious or tyrannical, supervision, and when they shall fail, those who hate the judges more than they love the state may apply for more stringent measures. They may demand what means of compulsion they shall be pleased to covet. They may have an act of Assembly (for they cannot do it by an article of the Constitution), to compel judicial

mildness, patience, and forbearance; they may inhibit whatever is peremptory, high-handed, or harsh; they may make rules for the judges, as the judges now make them for the bar; they may tone them down, as the ancient lawyers did their voices, in addressing the court, to the sound of a flute, till they shall be all softness, gentleness, and flexibility; and when, at last, it shall be discovered that the compulsory laws enacted by the people are disobeyed or set at naught by the bench, the times will then be ripe for severer measures, or, perchance, for an elective judiciary. Surely it would be wise, before resorting to extreme measures and looking to more remote objects, before we pass by the laws and take up the Constitution, before we prepare ourselves to adopt this present resolution, before we permit ourselves, by a sudden blast of unlooked-for legislation, to be driven from our ancient moorings, and floated off we know not whither, patiently to investigate our case, and to satisfy ourselves what it is we really need in order to give us a judiciary to our liking. Let us remember that it is "horn book law" to look to the old rule, the mischief and the remedy; and to ask ourselves what end it is we desire to bring about, before we apply our medicine or our discipline; what the matter is with our judiciary; what the faults we seek to subdue; what the virtues to cultivate and encourage. When the mother of Achilles caught by the heel her infant son, and plunged him in the Styx, it was to make him invulnerable, for war was to be his trade, and his game man; but, had the future pupil of Chiron been destined to the labors of the bench, all the waters of hell would have availed him nothing, would not have added one iota to his qualities, would not have furnished one accomplishment of his station, would not have made him wise, or learned, prudent, diligent, or just. If the judges are to make, or if they are to execute, our laws, let them betake themselves to party politics, let them earn their commissions at the polls, let them ride the waves of universal suffrage; but, if they are only to expound and interpret them, that is the last place to which it would be right to send them.

We have thus endeavored to point out two defects of our system which lie on the surface, without remedying which, though we may have many good and able judges, we can never have a thorough judiciary; and, not having remedied which, we cannot justly say that an appointed judiciary has failed, and the elective must be experimented with. No system ought to be condemned

which has not been fairly tried, with ordinary opportunity of success; and whoever will even casually examine our judicial establishment in Pennsylvania will be satisfied that these two faults alone are weight enough to sink our whole armament to the bottom. One of them could be amended by a single act of Assembly; the other is accessible only by some more tedious process of legislation; but to remove neither is constitutional change demanded; and, if that be resorted to, and bring with it only an elective bench instead of one appointed by the governor and Senate, we shall be just where we were before, with all the added inconveniences and inconsistencies belonging to a bench begotten and brought forth like anything but judges. If not prepared to content ourselves with a judiciary which has no judicial attributes, let us consider well what it is we are about.

What, then, is an elective judiciary, and what does it lead to? We utterly deny, that in any sound democratic* principle that ever was heard of, there is to be found one particle of foundation for the new-fangled dogma which teaches to elect the judges. Principles, not men, is a good maxim, and if every judge in the commonwealth were distasteful to us, we ought not, to gratify a spite, or satisfy a prejudice, or even to better our condition, sacrifice a principle. It is common to hear men, in occasional conversation upon this subject of changing the judiciary, ask each other the question, whether we could get at the polls worse judges than this or that one, naming, which may easily be done, some very incompetent personage. The same argument applied to other cases might alter every institution of the country, and afterwards carry us straight back again to the point from which we started. It does not follow, because the executive has not fulfilled his duty in the appointment of judges, that we should therefore refer ourselves to the people, if it be at the same time a principle of government that the judiciary should be appointed and should not be elected; and whatever they may tell us to the contrary, it is an established truth, that there are rules of policy which do not change with climate and position, which are equally applicable everywhere and under all forms and varieties of government, alike on the Susquehanna, the Tiber, and the Neva. One of those is that a judge should be kept quiet and cool, and out of the

* We use the word in its general, not in its party sense.

reach of disturbing influences. The same turmoil which is the element of wholesome life to the Executive and Legislature, is death to the Judiciary. Those convocations of politic worms whose proceedings and resolves are so usefully studied by other public men, would distract and ruin a judge. We saw a few weeks ago in the newspapers, the resolution of a convention held somewhere in New York, where it is known they have lately adopted an elective judiciary, by which one side voted to give up the nominations for the places of Attorney-General and State Engineer, provided the other would give them in return those for judges of the Court of Appeals and State Prison Inspector! In another New York paper, we read a paragraph headed "New York nominations—Election, Tuesday, "November 6th, 1849. The following are the nominations for Su- "preme Court, Senate, and Assembly, as far as made by the respective "parties." Then followed lists of candidates, beginning, "Supreme "Court, 1st District. Whig. William Mitchell. Democrat. Samuel "Jones," &c. &c. Afterwards came an "Anti Rent" ticket, a "Liberty" ticket, and a "Working men's" ticket. Five parties drawn up in the field for the judges to canvass and convince! As that respectable body of men, the Anti Renters, lately cast votes enough by throwing their weight into one scale, to carry the day, and give a governor to the state, their judicial nominations ought to be looked to with some anxiety by those householders who are fortunate enough to call them fellow-citizens. Another paper, capping the climax, announced that the New York Abolitionists had "nominated Frederick Douglass for Inspector of State Prisons, and "Samuel Ward for Secretary of State—BOTH COLORED MEN," the innuendo, as we understand it, being, that the judges were to be white men! We have seldom had a really able man in the executive chair of this large state; but nobody thinks of arguing thence, that, inasmuch as the people have failed to satisfy themselves, they should turn over the election of governor to some other constituency, and let the Legislature or the judges choose him. Certainly, we might have had more patriotic and incorruptible legislators than some who in times past have sate to represent us, but it would have been rather ridiculous therefore to abandon popular election. Our not having governors, legislators, and judges to our mind, does not establish the political fact that the selection of those officers is in wrong hands. And so, if the right of selection were once wrong-placed, no matter how acceptable the functionaries from time

to time bestowed on us, it ought to be none the less speedily changed. If Speakers of the House of Representatives were, under the Constitution of Pennsylvania, named by the governor, and no governor had ever given us for the chair other than the best man in the state, still this power ought to be forthwith taken from the governor and transferred to the House itself. Just as the power of choosing the President of the United States, now in the hands of a body of electors small enough in high public emergency to be bribed, or coaxed, ought, although those persons have never yet proved faithless to their trust, to be withdrawn from them without delay and committed to the whole people, with whom alone it can be safely lodged. It is as dangerous in politics to adhere to unsound principles as it is perilous in war to be found in false positions. We are by no means sure that it would not be wiser to choose our judges, as we do our jurors, by lot, than to elect them, for it is better to submit to see the laws uncertain than to sacrifice the purity of its ministers.

Does any man apprehend the weight of the judiciary in the political scales of this Commonwealth? With all power in the hands of the people, with no centralization, and with property subdivided among families at each successive generation, we need not be afraid of the bench, though places on it passed by hereditary descent. Mr. Jefferson said:* "The tyranny of the legislature is the most formidable dread at present, and will be for many years," and every candid man must say amen to that opinion. The judiciary is the weakest institution of every state, where it exists. In all times and in all nations, with the two exceptions of the Jews and Carthaginians, among whom the judges rose into power upon political disturbances, they have not only not usurped the powers of the other departments, but they have been deprived by them of their own. Charles the First, a vain and feeble tyrant, drove them to the wall, Cromwell did as he pleased with them, the State of Georgia set them at defiance, and the British House of Commons lately imposed upon them. It has been their fate to succumb to stronger influences than their own. When hereafter its history comes to be written, we shall learn how the English judiciary of the present day stand toward executive authority, but

* Writings of Jefferson, vol. 2, p. 443.

as for the men of some years ago, the proofs are before the world, that they were the instruments of power. Fair play and equal justice were a thing not so much as thought of, where the Crown had an interest in the game; their office was not merely to administer the laws, but also to assist to carry on the government; to aid in giving effect to the policy and measures of the hour. The Scotts, Kenyons, Laws, and Gibbses, with a libel on the minister, game laws, or country gentlemen, taxes, tithes, bank notes, or any such favorite matter before the court, looked upon themselves as bound to do the king's pleasure; and they did it if they possibly could. Like the colonel of a regiment who is ordered to take a battery, they charged and asked no questions. The two most celebrated Chief Justices, Mansfield and Ellenborough, at the same time that they filled their seats on the bench, held cabinet places and took part as ministers in all the heats of party. Let us imagine Mr. Taney appointed Chief Justice, yet retaining a place in the cabinet, or Mr. Wayne, promoted to the bench, continuing at the head of the Committee of Foreign Relations, and we will have some idea of the harness in which English judges went; but none at all of the submissiveness to the yoke which was habitual to dignitaries whose precedents we so anxiously seek and often so servilely follow. In this country, under our system of written constitutions, the judiciary are meant to be fortified by being declared independent establishments; but, having only their *vis inertiæ*, and lacking the "composition and fierce quality" which make aggressive force, they are open to be abused. The very meagreness of salaries, which in the other branches of government is compensated by the possession of power which surpasses respectability, serves to diminish the consequence of the judiciary in the eyes of a community where money is over-estimated, and where in that so much regarded particular every man engaged in any successful pursuit finds himself looking down upon them. The judge stands alone without either wealth or power, the hermit of the political world. Unable to defend himself, his safety ought to consist in his having little to lose. The politician who assails the executive or the Legislature may be better for his invasion of them; but the poor judiciary, if we stopped and stripped them on the highway, have not the wherewith to reward us for our trouble. Their faculties are administrative merely; on the bench not reaching beyond questions of property, and off the bench having no existence. The department in which justice makes itself the most felt and exercises most power, the trial

of issues of fact, belongs, not to the judges but to the people themselves; and without stopping to eulogize jury trial, of which it was said by Mr. Jefferson, better juries and no parliaments than parliaments and no juries, and by we know not whom, in speaking of the English Constitution, that, after all, the whole value of their boasted checks and contrivances of government was just to bring twelve men into a box, we may be permitted to remark that, exercised as it is by us, it is ultra liberalism. Here are men who pass upon life or death, liberty and property, who sit as it were above the judge, whom he can address in argument only, and not in command, taken by rotation or lot from the whole body of the state, as were some of the servants of the public a thousand years ago in the unmixed democracies of Greece. Let us add that while on the one hand the judiciary exercises no political power, on the other, excepting (alas!) when the time comes round for the renewal of the commission of a judge under the constitutional provision of 1839, they feel no bias, and are subject or liable to none; standing poised as they ought to be, and impartial among the jarring elements of party strife, as indifferent to their ups and downs, their issues and results, as they are to those of the private controversies which are carried on before them.

But we are told to elect our judges, that we may have better men than those we get by appointment. This is a mistake. We do not elect our political servants to obtain the best men, but to secure liberty. That is the object of suffrage. We elect our governor and Legislature because we are afraid of them, and but for the inconvenience of distracting the citizen too frequently from his private affairs, we might elect them for the month instead of annually or triennially. We could not make their terms of office too short, for we give them power, the cup from which none drink without becoming insolent and giddy. But to the judges we give no power, and therefore we appoint them. If they were corrupt and received rewards to betray us, or gratuities from suitors, if they ran perversely counter to the spirit and institutions of the country, if that conservatism for which they were ordained, developed itself to excess, and proved an impediment to wholesome and liberal legislation and the due administration of the republic, popular election of the members of the bench would be the appropriate remedy. But nobody ever heard a breath against the pecuniary honesty of a judge, and so far from withdrawing themselves from political sympathy and brotherhood with the community, the judiciary have been charged, and

sometimes too justly, with participating over-much in the party feelings of the day, and even with actively joining in the utterance of them. The Legislature and executive enact and execute laws to restrain us of liberty, to deprive us of life, to abridge us, under the name of revenue-raising, of large portions of our possessions; and if they were not strictly bound as our servants, would soon be our masters and our tyrants. Dispense, under no matter what guise, with electing such functionaries by broad, popular suffrage, and liberty becomes a name. In France, the late king, under a limited monarchy, did what he pleased, because there were only about two hundred thousand voters in the whole kingdom. In England, the crown has not more actual power than the President of the United States; but as elections, instead of being free and equal, are nothing but the oligarchy sending its majority to the House of Commons, their liberty is the liberty of the privileged classes, while the rest are only free on paper. But the Chamber of Deputies and the House of Commons were not therefore the less able bodies; on the contrary, they fully represented the talent of their respective countries, and one of the arguments the most strongly pressed against the English reform of 1831, was, that men of ability, who got into parliament through the nomination of borough-mongers, would find themselves excluded when the basis of representation should be enlarged. If the French, when they changed their institutions in February, 1847, instead of pointing their fingers to universal suffrage, and saying we will take that, had said we will take an elective judiciary, their revolution would have been fruitless, they would have gained themselves no freedom, and acquired only a bad bench. It is no more necessary, in order to obtain for ourselves an able judge, to take the vote upon him of the whole state, than it is to take the verdict of the same community in order to a righteous judgment in a suit at law. One judge and a jury will decide a cause better than any election district in the Commonwealth. A single executive and a Senate will appoint the judges for us as safely for liberty, and give us abler men beside, than the assembled voting wisdom of the entire republic. It is to create, preserve, and protect our liberty, and for that alone, that we cast our votes. If we are to get the best man for our judge by election, why does not the same process give us the best man for member of Congress or governor? We did not elect the soldiers who led our armies to victory in '76, in 1812, in 1847; we do not divide the land into naval

districts and elect lieutenants, midshipmen, and post-captains, that they may fight our ships; we do not elect our engineers for the state works, we do not elect the foremen and managers of the public foundries and arsenals, then why should we elect to a science or specialty like that of the law, which is quite as technical, which has not as much political power connected with it, and for which the community at large are still less capable to choose the administrators? So far from election giving us the best man, it is an admitted political truth that the best man is by no means the best candidate. His conspicuousness, his talents, his virtues, like those of Aristides, offend us. We hate superiority. The party convention which fixes upon its nominee, in pinching times, eschews a first-rate man, whose acts and opinions are before the world, and seeks out some sleek, moderate, unobtrusive individual, against whose well-balanced mediocrity little can be urged. This rule operates even in private life; but when we come to the great contentious stage of politics, it is a fixed fact and an axiom. To disregard such facts, to despise experience in framing our institutions, to overlook those frailties of the heart which God has made inseparable from our nature, to throw up our hats and huzza when we ought to compare, to contemplate and consider, to make constitutions at a rush, is to forget there is a time for all things, is to fly in the bright face of glorious liberty, and is as essentially a folly as aristocracy itself, or the divine right of kings.

There is one peril waiting upon the election of a judge, which belongs to the judicial case of all others. Elect a fool or a knave to a seat in the Legislature, and little harm is done. The member elected from the adjoining district balances him, for he is wise and honest, and our bad selection being of but one man in a hundred and thirty-three, a district is ill represented, but the country is in no danger. He is the obstinate man on a jury, or the refractory horse in a team, and is dragged along on his haunches by the rest. But elect for your judge a mischievous or incapable man, and you are lost; he will break everything to pieces; he sits alone, and will do irreparable damage. Imagine such a man elected to a ten years' presidentship of a judicial district, as we have sometimes seen representing a county in the House of Representatives. Now we send, in rare instances, be it said, but we do send, have sent, and will send again, to re-

present us in the Legislature, not merely very unfit persons, but broad fools and downright knaves, and men who are known to be such when nominated and elected, for there is nobody to whom we answer for what we do at the polls, and where there is no responsibility, men will take liberties. But no republican single executive since the world began, if we omit such nominal republics as those of Tiberius and Caligula, certainly no republican chief magistrate, when the body of the state was not diseased or corrupt, ever gave to the people for a judge either known fool or known knave, for the simple reason that his sense of responsibility must needs be too strong for his proclivity to mischief, however great. He is an individual, he stands alone, and every finger would be pointed at him. He cannot venture upon such a step. While, therefore, the executive may make bad appointments to the bench, he will not make atrocious ones, as we might at the polls. The most fastidious men vote unhesitatingly, being one of a constituency of twenty, thirty, or forty thousand persons, a ticket with names upon it, which the most thick-skinned among them would not assume it, upon his own personal risk, to appoint to any place whatever. It is even well to mix a little our legislative elements; not to the extent, it is true, of having downright bad matter among them, but certainly to that of having a fair representation of the diversified lights which are reflected from the community. Not so with the bench, where there is needed but one sort of men, and only one way of thinking. The jury reflects back, and ought to reflect the community, but the judge never. And if every man among us were thoughtful and prudent, if none voted without devoutly pondering the act, if our twenty-four judicial constituencies were composed of voters who knelt down and prayed to be enlightened before casting their ballots, still we have to remember that constitutions are not for ourselves alone, but for posterity also, and that posterity may be, nay, will be—for nations, as they grow older, grow more corrupt—even less capable than ourselves of bearing discreetly such burdens, as this which it is proposed to us to assume, and which assuredly would demand of all those upon whom it might be laid, a strong back and a virtuous will.

The persons among whom we choose our legislative and other officers, are political characters, and known to us, and whose merits are understood; but granting for a moment, that it is only to know the best man, and choose him, what acquaintance have the public at large with private individuals, and with the fitness of this or that lawyer for a seat on the bench? In some parts of the state,

the inhabitants are more or less known to each other, although with the rapid increase of population, this is a political facility which is everywhere daily diminishing; but elsewhere, and especially in the county of Philadelphia, where population is already dense, the judges, even after their appointment, and after they have been long administering justice to the citizen, remain unknown to him, so much as by name, still more by character and qualities; and there is no means by which they could make themselves familiar to us, save by long and distinguished service in high judicial place, or by descending from their seats to become wrestlers, if not in the political arena, at least in that of public affairs. As judges, they make slow impression on the district. The citizen who is withdrawn from his vocation for a tour of duty as a juryman, or who attends court as a witness, returns again to his business and his own pursuits, and soon after has no more recollection of the judge before whom he appeared, than he has of the conductor of a train in which he may chance to have travelled. It often surprises persons in Philadelphia, professionally connected with the courts, though it ought not, to find how utterly unknown to the mass of society are public men of elevated position who daily control them, and administer the laws of the land. As to that kind of familiarity with the particular merits and competency of individuals which would enable voters to discriminate between a magistrate adapted to the duties of this court, rather than of that, or their degrees of learning and capacity, the thing is wholly out of the question. We could imagine nothing more absurd than the discussion of the judicial ticket in Philadelphia, even by those political managers whose means of information may be the best, and after they should have taken the most effectual means to amplify them. How could a lawyer's advancement in a particular branch of the study or practice of his profession be relied on for promoting him to the bench, if everybody in the district must be made first to comprehend it? Let people's astonishment be conceived at an election hand-bill, in which they read in large capitals—

Vote early.—For Judge of the Supreme Court, Colonel such a one.

Vote for Smith, the great ejectment lawyer!

Vote for Jones, the accomplished equity pleader!

Vote for Judge Snapdragon! He overruled Binks *v.* Jinks, quashed the writ in Gerrymander's case, and delivered the great dissenting opinion in *re* Dishwater!

Or O *andres athenaioi*, why not a bait thrown out for that neither small nor respectable class of persons to be found in the large towns?

Electors of ——!! Do you adore liberty, do you love fresh air? Do you hate tyranny, do you despise the Quarter Sessions? to the polls, then, and vote against old Snooks! Huzza for a free foot, and down with the Penitentiary!

Nor would a lawyer, as a candidate for the bench, prove to be better placed towards voters, than the judges are. Counsel in lucrative practice, and thus somewhat known, though at best of a fame of limited circulation, unless they are at the same time meddlers in politics, do not often desire to transfer themselves to the bench, while those who are not eminent in the profession, are quite unheard of, and must find means as well as they could, to make themselves known to the electors. And that they would do by all the arts commonly resorted to to attain political preferment, arts honorable enough when place is sought, which is properly the subject of popular election, but absolutely degrading to the judicial aspirant, and, above all, unfitting and unhinging him for the impartial and independent duties of the bench. The first thing a judge would have to do the morning after his election, would be to wash his hands of the last six months, to forget what he had been, and all he had been doing, to treat his late associates, and the men to whom he owed his elevation, as Falstaff was treated when he approached the king, his former boon companion; having scaled the wall, to kick down the ladder on the heads of his friends. Perhaps the best course, certainly the safest, for our future Tilghmans will be, when the applauding crowds come under the window to announce with cheers, their majority at the polls, literally to throw cold water on them, and thus fix, once for all, the elemental difference between the candidate and the judge. His alternative would be to be ashamed of himself as a magistrate, or to blush for himself as a man, to ask himself the question when a party came before him, is this person of the green faction, or the blue, and feel the stings of his judicial conscience, or to keep his eyes straight before him, and know that he overlooks a friend. To him what ought to be the first gratification of the successful candidate, the opening of his house and his heart to the friends who had backed *his* suit, and helped him to *his* verdict, is denied, or being indulged in, constitutes an impeachable offence. A judge might declare his independence of those who had carried his election, he might struggle for propriety, and for a

while be victorious over his position, but which of them, with his daily bread depending on his place, could hold with unshaking hand the scales of justice, when the election day approached? Suppose, then, the leading politician of the district before him as a suitor, or that a question is to be heard bearing upon politics, or supposing no such probable, but unlucky accident, let us ask ourselves the simple question, how far the necessity of pleasing every "white freeman" of the county must touch or affect the doctrine, the judicial course, and the tenor of the way, of any magistrate or man, even the least bending, the most honest, and the most capable. Election implies representation of the sentiments of a constituency, and as a Congressman is not merely a democrat or a whig, but also represents the particular views of his district upon the tariff, or independent treasury, so the elected judge is bound, not merely to propriety and integrity, but to think as the public does which has chosen him upon those points of law which are of public interest. A New York judge placed upon the bench by the Anti Renters, is pledged to peculiar views of the land law, and the abolition candidate to opposition to a portion of the fourth article of the Constitution of the United States. The public man who is elected, if he be not, as he often must be, under written pledge, is yet dependent upon the electors, and the elected judge, whether pledged by writing or not, must look to each voter, for the same reason that a member of Congress does, and in the same spirit in which a Pennsylvania judge, under the present term of years tenure, though he cares not a doit for any other executive, yet regards most tenderly that one in whose good pleasure it chances to reside, either to recommission and launch him again for a new voyage of dignity and authority, or to dismiss him to the dreary shades of a private life; a consideration which would at this time seriously flaw the administration of justice, if the governor had as many interests to be subserved on the one hand, or offended on the other, as have the united voters of a judicial district. The appointing power is a single individual, however, and not a mass of them, and justice is still unsmirched. We carried the seat of federal legislation away from the crowds of a large town, and planted it upon the uninhabited and unwholesome banks of the Potomac, and almost every state in the Union has followed the example of withdrawing its executive and legislative bodies, and often at much practical inconvenience, to some small place in the interior, the object of which has been, not so much that they may be placed in the geographical, which is rarely the actual centre of the country, as to put

them out of the reach of undue influence. It was found that the stout-hearted representatives of the people could be swung from their duty (and how much more open to the winds of doctrine would be the weak judiciary) by that sometimes gale of popular opinion, and sometimes magnetic attraction that is felt among masses of men.

And yet, while the elected judge would be as "fearful as the virgin in the night" in one sense, he might with impunity be as rash as fire in another. He could not charge a jury against a vindictive and influential individual without hazarding his place, but he might shake the law to bits in his ignorance or indifference, so long as he avoided treading on the toes of the electors. It is the very nature of his tenure to answer only at the polls, and he may indulge in the most abominable and most injurious heresies without their costing him twelve votes—for how could it be expected that he should be driven from his place for making bad precedents, when not one in a thousand of his constituents ever sees or hears of those precedents, or, if they did, could by any industry be made to comprehend them. The judge is on a pedestal apart from the bustle of the world, and though he does not always conform to his position, yet the most careless of them do some homage to it. If we elect, we involve him in the currents and eddies of the stream, and thus change, whether for better or for worse, the whole moral of his relations with society. What match would be the judge, if he retain the gravity of his station, for some enterprising lawyer who coveted his seat, and who, when the day was coming for election, set in motion the machinery of politics to overturn him? Meetings are called, speeches made, solicitation and intrigue are at work, squibs and paragraphs fill the newspapers, and cover the unfortunate magistrate with ridicule and calumny. If he sit still in his place, he is lost, he loses his seat, and perchance his character too. If he come down and take part in the fray, then what a sight do we see! In the morning he holds the sword of justice, in the evening he scuffles at a meeting! It is, at least, a grave consideration that, by this step which we are called on to make, we alter the tone of an important institution, and alter it irrevocably; for let it be remembered that power once given is not to be taken back; and if this stake which we are to throw—this political experiment we are about to make, prove unfortunate, we are not to think that either posterity or ourselves will ever be willing to restore to the executive that authority which the Legislature and people have taken into their more tenacious keeping.

It is idle to tell us that an elective judiciary has ceased to be an experiment, that other states of the Union have made the proof of it, and especially that our neighbors of New York (whose politics, never an example, are now become a beacon to warn us from the shallows) have already elected a fair judiciary. Political experiments of yesterday, made, too, in thriving communities, where there is every advantage of individual prosperity, enterprise, and wisdom to countervail their effects, may be proof of nothing but the rashness of the experimenter. Experiment, in the proper acceptation of the term, has never been made of an elective judiciary. It lies in theory, the theory of schemers; and against it is the sober judgment, if it can only find vent, of our own Commonwealth and the vast majority of illustrious writers and teachers of all ages. Theory may be as respectable as practice, when it has passed into axioms, and become of that species which is called principle; but let us not be talked down with predigested crudities, which deserve the name neither of theory in the statesman's sense, nor of experiment in any. Two or three generations hence let them tell us how their elective judiciary works. Nobody supposes that a commonwealth of this Union, young, vigorous, and almost poison proof, is to be tainted and broken down in a year, or in twenty years, by even the very worst institutions. A man may have youth and health enough to carry him through many perilous tests of his physical constitution, but when all is done, and he survives to tell the tale, it must not be said that he is indebted for his life to his experiments. We will grant, what, however, no man yet knows, and what any man who will look into Comstock's Reports will be disposed to doubt, that they have in New York elected, in the blush of their essay, one single capable judiciary. We will freely grant it has not broken down at eighteen months old. But if the next year were to bring with it agricultural and commercial distress, insurrections, wars, or any of the disasters and disturbances that are incident to society, if it be the destiny of their political machinery to be strained, to be grated with misfortune, to encounter hard and troubled times, does any man suppose that this sunshine experiment would be to be ventured upon? What manner of doctrine is that which is fit only for a fine day? Politics and constitutions are for all weathers. It is true that, where the people are intelligent, free, and uncorrupted, it is surprising how little government of any sort is required, and how much bad government can be borne with; and, excepting certain portions of the population of large towns, so sound and healthy are

the people of the United States, that we do believe, if the restraints of our various artificial institutions and all their aids were removed to-morrow, and we were left to ourselves, we might make a somewhat orderly as well as a rather imposing figure in the world. But if we do adopt laws, they ought to be the right ones. We commit a great mistake to persuade ourselves that we may be guilty of political solecisms with impunity, and that, having liberty, our institutions, rough hew them how we may, cannot but be as perfect in detail as they are superior and admirable in their general outline and original design. An elective judiciary is more democratical than one which is appointed by the executive. Be it so; so is a primary assembly of the people more democratical than either; and such an assembly would also be more democratical than what we call our Senate and House of Representatives. Yet we neither administer justice nor legislate this wise. Montesquieu, a liberal by instinct and by reflection, an author who in his department has never been superseded, who seems to have understood the springs of government better than any other, and upon whom the best criticism was that he had too much wit, tells us that "The principle of democracy is corrupt, "not merely when the spirit of equality is destroyed, but also when "that spirit runs to extremes, and every man wants to be the equal "of those whom he has selected to put above him; when the citizens, "unable to endure the power which they have entrusted to others, "would fain deliberate for the senate, execute for the magistrates, "and pull the judges to pieces." It is dangerous to make bad laws, to tamper with ourselves, to play the fool, to propound the question with how much weight we can load without breaking the back of liberty, to try the experiment with how little good and valuable service of our public men we can stagger along, to make light of everything, and

> "Dance to the rattling of the chains that bind,
> In servile shame, the rest of human kind,"

when conscious, as we are, or ought to be, that, however blest our condition, it will one day change; that nothing which is worth having is preserved without care and toil; and reflecting that nations must have their decline and fall, as well as their point of culmination, and, like individuals, their accesses of disease and their periods of decrepitude, we ought to be preparing ourselves against the struggles which are to come. How soon to come, let that philosopher

tell us, if such there be, who professes to draw the impenetrable curtain which hangs before the morrow. The day which shall see us without our liberties is far off, and many a generation below the horizon; but who shall say how soon, if we trifle with our laws, the process of our corruption may not begin. There is a taint in all things human, a frailty, a seed of dissolution, an original sin for our best institutions, as there is for our immortal souls. The republics which preceded ours, the ancient republics of Italy and Greece, lived in the midst of revolutions, and of almost constant war. A national crisis was as common at Athens as commercial troubles are with us, and the public virtue of antiquity had a proportionable elevation. Ours are times which do not highly tone man's natures; we see that, in comparing our present race of politicians with those of the last century; those heroes to whom we are so everlastingly indebted that we ought never to think of them without invoking a blessing on their memories, and who were as immeasurably our superiors, as the men that pass through a revolution always are to their fair weather and smooth water successors. Our men and our measures both are the worse for uninterrupted prosperity. Show us the people which, with serious business on their hands, have fallen into such needless utopianism as electing the judges. Look at the French, the leading democrats of the Old World; they are still like their fathers of the dawn of the Christian era, and the days of Diviaticus, studious *rerum novarum;* and when, some two years ago, they broke their bonds and established a republic, it might have been supposed that, rioting in their new liberty, which was achieved in the very streets, they would carry liberal principles through. Accordingly, in their constitution they ordain that the "French republic is democratic, one, and indivisible;" language an octave higher than that of the Washingtons, the Franklins, and the Madisons who made the constitution under which we flourish. That "its principles are liberty, equality, and fraternity." They took the bold step of creating a single legislative body, and that consisting of seven hundred and fifty members, while we have two, one to check the other, and both of them together with less than half the number of the one French chamber. They declared population to be the basis of representation, while the Constitution of the United States declares its basis to be property as well as population; and the Constitution of Pennsylvania makes taxation one of its ingredients, which is property by another name. Yet when these Frenchmen, whom

we in this country have designated, and, to our shame, unkindly stigmatized as visionaries, come to the judiciary, they pause in their bounding career, and, instead of declaring their judges to be eligible at the polls, as they had been under their former republics, the republics of Robespierre and Barras, they resolve that "The judges of the courts of first instance and appeal, of the courts of cassation, and of the court of accounts, shall be appointed for life," "and appointed," says another article of their constitution, "by the president of the republic." The ancient Athenians, the countrymen of Themistocles and Phocion, were as lively and impressionable as the modern French. Their republic was a pure and real democracy, where the people met, not in one chamber or two chambers of a few twenties or hundreds of delegates (for the representative principle of government, which is a discovery of modern times, was then unknown), but in one vast universal assembly of the whole nation, at which every Athenian, however humble, might stand up and propose what laws and measures he liked, either for the alteration of existing policy, or for the introduction of new. And, although in that most critical, most fickle, and most difficult community, they had in the Areopagus a judicial tribunal, of which the members were appointed during good behavior, yet history does not teach us that, in the long ages during which this court existed, the politicians of Athens ever moved to elect the Areopagites at the polls, or to reduce them from the tenure of good behavior to a term of years. The Athenians, like the French, were restless enough, and often changed their institutions, but they played great games, and found no glory in picking at the judges.

We have before us a resolution or law, passed by a species of mutual default, both parties opposed to and condemning it, but each waiting for the other to move against it, by which the judiciary is bound hand and foot, for that is the substance of it, to be buffeted of party. It would scarcely, we think, be taken as it stands, even by the extremest lover of elective judiciaries. No man can read it, granting the point of electing judges, without being struck with the succession of blunders it exhibits. And really too, we must be allowed to say in passing, that when it comes to drafting the fundamental laws of states we are entitled, for many reasons, not merely to sound politics, but also to what seems in this instance to have been wholly

overlooked, some sort of attention to the method of sentences, and a reasonable precision of thought and expression. A slovenly constitution is unpardonable. When the men who made that of the United States, and who, compared with the constitution menders of the present day, were an assembly of the gods, had agreed on a frame of government, they did not despise, before letting it pass from their hands, to raise a committee "to revise the style" of the draft (such was the instruction of the convention to the committee) which they were about to submit for approval to the people. One of the members of that committee was Mr. Madison himself, and the legend is, that there was as much pains taken in polishing the style of the paper, as had been bestowed upon the discussion and examination of those immortal principles which it promulgates to the world. Now, though this so called amendment of ours of the second section of the fifth article did not go to a committee, but came jumping, monster-like, into the world, after no due period of gestation, still common propriety would seem to demand that a constitutional provision should not consist, as this does, of redundant language, intricate phraseology, and in more than one place, downright bad English. But our business is rather with the matter than the manner, and we proceed to a few observations upon what have struck us as faults, the correction of which is indispensable, before this contemplated section would be fit to come before any people to be voted on. The perverse ingenuity displayed about the chief justiceship seems to be the strangest of all the author's contrivances. It is well known that upon the presiding magistrate depends the court; and, as a general without an army is said to be better than an army without a general, so there is no use of having a good court with a deficient presiding officer. He is the master of the ship, the colonel of the regiment, every man familiar with courts of justice knows he is the *sine qua non*. What then is the provision to supply us with competent persons for the head of the Supreme Court? "The judge," says the resolution, "whose commis-"sion will first expire shall be Chief Justice during his term, and "thereafter each judge whose commission shall first expire shall in "turn be Chief Justice," and "The persons who shall be elected "judges of the Supreme Court shall hold their offices as follows: "one of them for three years, one for six years, one for nine years, "one for twelve years, and one for fifteen years;" and then follows a direction that, on first coming to their seats on the new bench, they shall decide by lot what judges shall hold respectively the

three, six, nine, twelve, and fifteen years places. So that it will be perceived, the judge drawing No. 3 is Chief Justice, and the judge drawing No. 15, does not become Chief Justice until he shall have arrived to within three years of his term of office, and so in due proportion with the intermediate numbers six, nine, and twelve. The effect of this arrangement is, *first*, that, as soon as a judge has had his three years experience in the lead, he must lose his place, and we the benefit of that experience, for should he even be re-elected and come upon the bench again, he comes redueed to the rank of an associate judge; and *second*, that the chief justice is the head of the court by force of rotation merely, and stands in the same relation of authority towards his brother judges, that a commander occupies toward one or more other commanders with whom he takes it turn about to lead the troops. In a word, the whole advantage of a real and substantial chief of the court is sacrificed to what we suppose is meant for rotation in office. Here are the people upon whom we are thrusting, whether they will or not, the election of judges. If they can provide us with the whole bench, they can also name the foremost man of them for chief justice, and in that event we would not only have a leader in the lead, but we would have him there fifteen years instead of three. But no—we are to be deprived of both these advantages, and at the same time unreasonably forced to abandon in favor of we know not what political crotchet, the very principle upon which the entire resolution is made to turn, namely, the right of the people to choose all their officers. Rotation in office is as necessary to free government and pure administration as popular election is; but they are both liable, like all the blessings we have, to be turned upside down; and rotatory chief justices would be of exactly as much advantage to the law, as a rapid succession of cooks would be to our kitchens, or changes of managers at short intervals to our furnaces and factories. By another clause, in a certain contingency we are ordained to fill the same office not by election merely, but by an appeal to the doctrine of chances too, the judges being authorized to cast lots for that high seat (shades of Tilghman and McKean, head or tail for chief justice!!) if "two or more commissions of the judges should expire on the same day." How "two or more commissions" of the elected judges *can* expire, according to the provisions of this resolution, on "the same day" is more than, in our arithmetic, we can understand, and therefore this august ceremony, which, in order to fair play, ought to be performed in front of the capitol, would seem to be super-

fluous; unless indeed it be meant that the toss-up shall be between the regularly elected judges, and the one or more who may chance to be interlopers to the end of the year, under appointment of the governor; and, in that event, to make the duly elected functionaries give way before the luck of the temporary incumbent would be worse still. By another clause, Presidents of the Common Pleas are compelled to reside, of all places in the world, in the very one where they should not: namely, in the districts in which they sit. This grave error seems intended for an introduction of the representative principle upon the bench, making the judge represent a district, and the inhabitants thereof his constituents; but, whatever it is meant for, it is a sacrifice to shadows of the great, real, and substantial advantage of having judges, as we often have, and always ought to have, residing out of their districts; and thus, not being inconveniently intimate with persons and things in their midst, impartial and indifferent to all but the actual question that is before them. In the Constitution of 1790, the same error was committed; but experience having established its noxiousness, it was discarded in 1839, to be taken up and commended to our adoption again in 1849. Having thus taken care that president judges shall know the issue not from the pleadings only, but shall also be properly stocked with the gossip of a cause before they take their seats to try it; that they shall be master of the tea-table view of it, as well as that which arises on the evidence, it might be supposed that this same resolution which makes us pay so dear to have the judge among us after, would not omit to provide for our having his company also before, the election; but, strange to say, it is nowhere set down that the electors shall have had any opportunity whatever of acquaintance with their candidate arising out of his residence in the district. While there is a constitutional incompetency of persons elected members of assembly, whether to the Senate or House of Representatives, without having been inhabitants for specified times of their respective districts and counties, we will be able to choose a man, should we find find ourselves so disposed, for President or Associate Judge of a Court of Common Pleas, who has never been inside of his county or district at all. It may be said that the probability is against such a chance; so it is in choosing members of the Legislature; but nevertheless, the omission, in this way, of common precaution serves to prove how really careless of our fate is the hand which affects to be held out to assist, to befriend, and amend us. If the broad rule

had been adopted that, in order to the independence of the judiciary, the Legislature be left free to enact that judges should be strangers to the electors of their respective districts, whether before election or afterwards; that, for example, the people of Alleghany county should elect the judges for Philadelphia county, and the people of Philadelphia those for Alleghany; and that to clear their skirts of influence, the judges for neither county should reside among the voters who elected them, unless while actually holding a court, we could comprehend the object of such a provision; but we profess ourselves unable to understand why the same magistrate who is strictly held to residence among his constituents after election, should run loose before. The want of precision, or want of consistency, of the proposed amendment in this particular, must have struck forcibly some of the members of the House of Representatives; for we find, at page 930 of the House journal, signed by Mr. McCalmont, Mr. Walters, and Mr. Courtney, a protest dated the 2d April, 1849, by which it is objected, among other things, to the resolution, that it "does not decide whether the president judges "shall be residents of their districts at the time of their election."

The heedless penning of this paper shows itself again in the clause by which it is declared that "the Associate "Judges of the Courts of Common Pleas" shall be elected "by the "qualified electors of the counties respectively," the effect of which is the creation of a totally new constitutional necessity, which never was conceived before, and probably not intended now, that of, at least, one associate judge for each county; for, in order that they may be elected by the "counties respectively," each county must elect one or more associates, otherwise there would be counties provided with them, and counties left without. The Constitution, as it now exists, leaves their number to be fixed by the Legislature, as it ought to be; but this amendment, by sheer mistake, the result of haste and inattention to the use of words, makes their numbers a thing of fundamental law. The Judges of the Supreme Court, says the resolution, shall be elected by the "electors of the Common-"wealth at large;" the President Judges of the Common Pleas Courts and other judges, required to be learned in the law, by the "electors of the respective districts over which they are to preside, or act as judges," and the Common Pleas associates by the "electors "of the counties respectively." If, therefore, at any future day, a reform be attempted of the numbers of our judiciary, the Legislature, while they would be at liberty to reduce the number of presidents

to just so many as the State should really need, would find itself met, in dealing with the associates, by an unlucky phrase in the 2d section of the 5th article, which would prove an effectual bar to bringing down their numbers to the line of economy and usefulness, without first procuring an amendment of the Constitution.

It was not, however, heedlessness of the penman, but an apparent indifference to the fate of the law, and perhaps a desire to reach obnoxious individuals, that prompted another clause, that which makes "the commissions of all the judges who may be" in office at the date of the election succeeding the amendment, "expire on the "first Monday in December following, when the terms of the new "judges shall commence." The hundred and fifty or sixty old judges thus go out, and the hundred and fifty or sixty new ones thus come in on the same day. So much for the judges; but what is to become of the law? No man will doubt that, if every judge in the state lose his commission at the same hour, the law must come to alteration, and be rendered unsteady and uncertain; that our business, our industry, and the general well-being of all must feel the effects of a movement so sudden, so violent, and withal so unnecessary. Nothing would have been easier than to provide, as was done by the framers of both our constitutions, for gradual, instead of instantaneous and entire change of the bench, and thereby avert the disastrous possibilities that wait upon the act of levelling every judicial head at a single blow. Should this portion of the resolution become part of the Constitution of Pennsylvania, there is not an already adjudged and decided question, in which any lawyer in the whole state has for himself or for his client a more than common interest, which will not be brought up before the new bench for a change of judgment; and if the first elected Supreme Court happen not to be composed of strong men; or if, being strong, they chance at the same time to be enterprising, or innovating in their tendencies, incalculable mischief will ensue. It is notorious, among professional men, that there is at this moment a general anxiety that this case should be kept back, and that one pressed as speedily as possible to its conclusion, in contemplation of the possibility of their being to be passed upon by an entire new bench. A legislative body made up altogether of raw members would be awkward and embarrassed in its action; but such a judiciary is infinitely objectionable. As concerns the judges of the several Courts "of Common Pleas, and of such other Courts "of Record," excepting the Supreme Court, as are now established,

the same undiscriminating operation is to be repeated every ten years with the law judges, and every five with the associates ; they are all to march out together and ground arms like a capitulating garrison at a given hour of a fixed day.

By a clause to which we have already incidentally adverted, it is declared that "Any vacancies happening by death, resignation, or "otherwise, in any of the said courts, shall be filled by appointment, "by the Governor, to continue till the first Monday of December "succeeding the next general election." As any stray lawyer who might come poaching upon the bench in this way, would be there for a term somewhere between one day and fifteen months, but not more, we devoutly pray that few vacancies happen, to be filled with the sort of persons that would be content to desert their business at the bar, to go jaunting on such judicial excursions. But this is a small consideration compared with another which here presents itself. There is no provision whatever made for filling vacancies by election, and the Governor's power of appointment being declared to be to fill them only "till the first Monday of December succeeding the next general election," should a judge die, his place would remain open for whatever remained of his term, and that might be the whole ten years in the Common Pleas, or fifteen in the Supreme Court, excepting only the year during which a successor could sit under executive appointment. The judge is elected in October, he dies in November, and the Governor fills the vacancy by an appointment which lasts "till the first Monday of December succeeding the next general election," namely, for about one year. At the end of the year, there is no power left in the Constitution or laws to fill the vacant place until the close of the ten or fifteen years' term; and during that period a Common Pleas district goes without its judge, or the Supreme Court goes lame, being deprived of one or more of its members. In the case of members of assembly, there is a full provision for the case of vacancies. The twentieth section of the first article of the Constitution declares "that, when vacan-"cies happen in either House, the Speaker shall issue writs of "election to fill such vacancies." Under the Constitution of the United States, there is provision for a temporary executive appointment to vacancies in the Senate, as there is in this proposed amendment of the Constitution of Pennsylvania for vacancies on the bench. "If vacancies happen by resignation or otherwise, during the "recess of the Legislature of any State, the executive thereof may "make temporary appointments until the next meeting of the

"legislature." Article I. Sec. III. § 2. If the provision stopped here, we would be in the same predicament, in case of the death of a senator in Congress from Pennsylvania, in which we are left as to the judges by the resolution now in question. The executive would have power to fill vacancies until the next meeting of the Legislature; but the Legislature would have no power to elect when it did meet. But the clause proceeds thus: "which," namely the Legislature, "shall then fill such vacancies." Thus creating that power to hold an election to fill the remaining portion of the term, which this resolution omits, and without which it is at least a question whether any election could be held. Again, if this difficulty were out of the way, and there existed a provision for electing to vacancies, still, as the death of an appointed judge would leave the executive exhausted of his power, his right to appoint being limited to vacancies of elected judges, and not extending to appointment in the stead of appointed judges, a place might remain open for some year or more, without the constitutional possibility of filling it. For example, a judge is elected, he dies soon after, and the Governor appoints. The appointed judge also dies, and the Governor, having authority to fill vacancies caused by death, resignation, or otherwise, of elected, but not of appointed judges, the place remains vacant, perchance, from soon after October until December in the succeeding year, the election to fill it being capable of being held at no other time than on the general election day in October. Again, and once more assuming the existence of authority to fill vacancies by election, a judge may die in October, just before the day of election, and too late to allow of the issuing writs to elect his successor. The Governor's power is to fill the vacancy only until the December succeeding the approaching election, namely, for little more than two months of a twelvemonth's vacancy; for it is not until October of the year following that an election can be held. Thus, the place is full for two months and vacant ten. When the house is thrown empty upon our hands, we provide a two months' tenant when what we want is one for the year. And this forsooth is amending the Constitution! Why any annuity tables to which we referred ourselves, would tell us that the common and ascertained hazards of human life would leave us with places enough vacant by death, without reckoning human caprice and other causes which make them vacant by resignation, to ensure our having never less than several districts at a time with no judge to them. The Supreme Court, composed, as it often is, of individuals advanced in life, might

disappear altogether. How possible a succession of deaths and resignations is in high places, at short intervals, those who are skeptical may convince themselves by looking at the fly leaf of 3 Barr's reports, where it will be seen that two vacancies were filled on the bench of the Supreme Court, and two in the office of Attorney-General, within a period of three months and two days, Mr. Coulter having been appointed on the 16th September, 1846, in the place of Judge Kennedy, deceased; Mr. Bell, on the 18th November, 1846, in the place of Judge Sergeant, resigned; Mr. Read, Attorney-General, on the 23d June, 1846, in the place of Mr. Kane, promoted to the Bench; and Mr. Champneys, Attorney-General, on the 18th December, 1846, in the place of Mr. Read, resigned.

Another clause, and the last we will mention, with determination on mischief, sedulously provides that the judges be elected on the "day of the general election of this commonwealth," thus denying them what could so easily have been given, an election day of their own, and apart from the political controversies of the time; and carefully mixing them up with every party strife that happens to divide the community; thus refusing to temper the wind to the shorn judiciary; thus not only leading them into temptation, but into temptation that is inevitable and irresistible; thus sousing them headlong in the great cauldron of politics, where bubbling amid the more attractive metal of governors, legislators, congressmen and sheriffs, the poor, unheeded judiciary would find itself, at last, the very scum of the pot. Not only is it omitted to be provided that the judges shall have an election day to themselves, but with constitutional cruelty it is excluded from the power of the Legislature to give them one.*

* These pages, which have already gone in number much beyond what we meant they should, are now passing through the press, and we will not add to them more than a note, to suggest a question which was asked of us to-day, namely, how contested elections, under the proposed amendment, would be decided. The 12th Article of the first section of the Constitution provides for the determination of contested elections of members of the Legislature; the 2d section of the second Article for those of the Executive; but what is to become of a judicial election, if false votes be received, or true ones thrown out by the election officers? And, if there were a power in the state to decide contested elections, what is to become of the district pending the contest? Judges could not constitutionally cross the borders of districts to hold courts. They must be "elected" "by the qualified electors" of the districts in which they hold them. The contested district, therefore, could not be temporarily supplied with judges from other districts.

We do not see how it is possible to introduce such a double handful of blunders as is embodied in this joint resolution by way of amendment to anything, and above all, to the Constitution of a great state. Indeed, it seems to be admitted publicly by the friends of an elective judiciary, that the error committed in not fixing on some other day than the second Tuesday of October for choosing the judges, ought alone to be fatal to the present resolution, and that the measure must go back and be started afresh at the approaching session of the Legislature. Certain it is, that our case ought to be desperate indeed, to induce us to adopt it as it stands. And when it does go back, let us beseech, let us require of our representatives what is surely but an act of duty, and which, being once faithfully performed, we believe that every man in the Commonwealth would sustain any fair conclusion to which it might lead, namely, to raise a committee which shall cautiously, but without fear or favor, and with that patriotic impartiality which becomes a subject so deeply interesting, inquire into and report upon the causes of, and the remedies for, the judicial evils of which the community complains. We believe that any law, which, leaving the bench independent, should make it yet responsible, would relieve us of as many of our complaints as it is possible to remove so long as we have more judges than work. Let us reform our judiciary, and not destroy it; if it have faults, let them be remedied; if it have defective members, let them be cut off; let us deal with grave things like grave men; let us not pull down a system to reach an individual judge; let us not, to expel the tenants, fire the house. A judiciary, to be worth the name, must be independent, must be respectable, must be apart from the dust and bustle of life, and, above all, must be kept out of party politics. It is absurd to be scared with the bugbear interrogatory whether in a popular government we are afraid of the polls! We are afraid of false doctrine. We are afraid of mischief in any shape. We are afraid of whatever is wrong. We would be afraid to bear false witness against our neighbor, we would be afraid to try an ejectment at the polls, or to go before the executive, on a report of ways and means. It is not every flourish of pretended liberalism that is bait for the people. We are not urged by oppression, we are not striking for national redress, we are not like our unfortunate brethren of Europe, the Hungarians, the Germans, the Italians, famishing for free institutions, and eager for any morsel that is called by their name. We are already free and happy,

"As fresh as eagles having lately bathed,
As full of spirit as the month of May."

If it were asked of the Magyars to accept a government by which the whole people should freely assemble to make laws and to execute them, they would gladly and wisely exchange for it the domination of their blood-stained master whether at St. Petersburg or Vienna; but any man in America, we presume, would smile at the proposal to substitute a mass meeting for such institutions as ours are. We do not want to know how we can be judged, and keep our lives and property; we want to know what is the very best judicial system. We abound in the wealth of freedom, and whatever is best that we may enjoy. The ancient magistracy of France, as it existed until 1789, a respectable body, bought their places of the king at the door of the treasury. We too could limp along with judges who bought their places, or with elected judges, and so we could with a President chosen by Congress, or a Congress chosen by the President. But as we have liberty, so we have ambition, and pride of institutions, and we cannot submit to be towed about with expedients of policy. We are not to be soothed out of real wants or coaxed to imaginary ones by artifice and hyperbole. We are not to be, by sciolists, lectured on the ballot-box, as if it had beauties yet unrevealed to us. There seem to be persons who think to stun us like so many Tartars, with the wonders of popular election. Popular election! God grant, whatever may befall it in the Old World, that where we live it moult no feather, that the day be far off when the meanest man among us would not die for it in the last ditch, that the towering growth of those free principles planted by our fathers, and in comparison with which our material progress sinks into insignificance, may continue for long ages to astonish and confound the foes of liberty! But can popular election set a leg, or will it take a lantern and look up a judge for us? Hath it skill in law any more than in surgery? The people of Pennsylvania do not think so. They are ready to hear the truth, and they appreciate when they hear it, and it is not for them inducement enough to a measure of change that it adds to the cup of their own authority.